UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

L.H. MEEKER, et al., **Plaintiffs,** **v.** **BELRIDGE WATER STORAGE DISTRICT, et al.,** **Defendants.**	**1:05-CV-00603 OWW SMS** **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (DOC. 64) AND DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (DOC. 70).**

I. INTRODUCTION

This case concerns water entitlements appurtenant to lands located in the Belridge Water Storage District ("Belridge") in Kern County, California. Plaintiffs L.H. Meeker, Debra Wood Brants, James M. Shaffer, and Robert E. Sweeney, all residents of Texas, own lands within Belridge along with appurtenant water rights. Some of Plaintiffs' lands are serviced by Belridges' water supply system ("Service Area" or "SA" lands) while some are not ("Non-Service Area" or "NSA" lands). Plaintiffs assert, generally, that Belridge and certain members of Belridge's Board of Directors, namely William D. Phillimore, Robert E. Baker, and Larry Starrh ("Defendants"), violated various provisions of California law and effected takings of their property (water) without just compensation by passing a resolution that prohibited the transfer of water entitlements from NSA lands to SA lands.

Plaintiffs initial complaint, filed May 3, 2005, alleged

that the passage of the resolution by the Belridge Board should be declared void because it violated (1) the Political Reform Act, Cal. Gov. Code § 87100, which prohibits any public official from making decisions in which he or she knows or has reason to know that he or she has a financial interest; (2) California Government Code § 1090, which prohibits public officials from being financially interested in any contract made by them in their official capacity; and (3) the Ralph M. Brown Act, Cal. Gov. Code §§ 54950-54963, which requires that local legislative bodies hold open meetings and public agendas of topics to be discussed at those meetings in accordance with the requirements of the Act. (Doc. 1.) In addition, the initial complaint alleged that the Board's actions constituted (4) a taking of property without just compensation in violation of the Fifth Amendment to the United States Constitution and subjects Belridge to inverse condemnation exposure under state law; and (5) unfair competition based on an unlawful business practice, entitling Plaintiffs to injunctive relief. (See *id.*)

Defendants moved to dismiss the initial complaint. (Doc. 16, filed May 31, 2005.) A memorandum decision issued January 17, 2006, dismissed with leave to amend the federal takings and state-law inverse condemnation claims, along with the California Government Code § 1090 and Brown Act claims. The Political Reform Act and Unfair Competition claims survived. (Doc. 48.)

Plaintiffs then filed a second amended complaint on April 4, 2006, re-alleging all of the claims contained within the initial complaint along with a host of new sate-law causes of action:

1. Violation of Political Reform Act of 1974;
2. Violation of Gov't Code § 1090;
3. Violation of Common Law Conflict of Interest;
4. Inverse Condemnation;
5. Conversion;
6. Breach of Written Contract;
7. Breach of Implied in Fact Contract;
8. Breach of the Implied Covenant of Good Faith and Fair Dealing;
9. Intentional Interference with Prospective Economic Advantage;
10. Negligent Interference with Prospective Economic Advantage;
11. Unfair Competition;
12. Violation of Ralph M. Brown Act;
13. Violation of Water Code § 43003;
14. Failure to Complete District Project;
15. Violation of Rights of Association et al.

(Doc. 62.)

Defendants move to dismiss all but two of the claims in the SAC for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 65) (Defendants do not challenge the Political Reform Act and Unfair Competition claims, the only two claims to survive the previous motion to dismiss.) Plaintiffs oppose dismissal (Doc. 85) and move separately for a Preliminary Injunction (Doc. 70).

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II. BACKGROUND

Plaintiffs own land within the jurisdiction of the Belridge Water Storage District ("Belridge"). Belridge contracts with the Kern County Water Authority ("KCWA") to receive water. KCWA in turn contracts with the State Department of Water Resources ("DWR") to receive a supply of water from the State Water Project ("SWP"). Jurisdiction is invoked under 28 U.S.C. § 1332, because there is complete diversity and the amount in controversy is more than $75,000.00 exclusive of costs.

KCWA entered into a contract with DWR in the early 1960s, pursuant to which KCWA was granted a maximum entitlement of 1.1534 million acre feet per year. Belridge's contract with KCWA grants Belridge an allocation of 163 thousand acre feet per year from KCWA's maximum annual entitlement.

Belridge's distribution of its 163 thousand acre feet per year annual entitlement to users is subject to, among other things, the California Water Storage District Law, which requires equitable allocation to the lands within Belridge, subject to other existing priorities of use. There are no "priority" zones within Belridge that might entitle certain lands to higher priority than other lands.

Belridge is a landowner voting Water Storage District governed by a five-member Board of Directors ("Board"). *See* Water Code § 41000. The members of the Board are "public officials" for the purposes of the Political Reform Act. *See* Gov. Code § 87100.

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A. The Landowner Contracts.

Belridge encompasses lands that are currently served by the Belridge water distribution system ("Service Area" or "SA" lands) and land that is entitled to receive water but is not currently served by the distribution system ("Non-Service Area" or "NSA" lands). Plaintiffs own both SA and NSA land in Belridge. All SA and NSA lands are entitled to receive water pursuant to recorded contracts ("Landowner Contracts") with Belridge.

The Landowner Contracts ("LCs") were first entered into in 1966, but have been amended several times, most recently in 2004. The initial LC was between the Belridge Water Storage District and the Occidental Land & Development Co., Ltd. (*See* Doc. 39, Carlson Suppl. Decl., Ex. 1 at 1.[1]) Article 5(b) of the LC sets forth the method for calculating the volume of a Buyer's entitlement to water under the contract:

> Commencing with the year of initial delivery, [Belridge], each year, shall make available for delivery to Buyer in each Zone of Benefit, as such zones are shown on the plan attached hereto as Exhibit "A", the amount of Project Water expressed in acre feet which is the product of Buyer's acre foot per acre antitlement in such Zone of Benefit for such year as set forth in Exhibit "C" hereto attached multiplied by the number of "owner acres" included within the portion of Said Land in said Zone of benefit. The total of all such amounts, for any year is referred to in this Contract as Buyer's annual entitlement for such year.

Article 6 explains that Belridge's delivery obligation is limited to the delivery of Project Water to specified locations (set forth in Exhibit D to the LC):

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[1] The obligations contained within the LC were made subject to the obligations and limitations imposed upon the District by the contract between the State of California Department of Water Resources and the Kern County Water Agency.

> Project Water made available to Buyer pursuant to this Contract shall be delivered to and accepted by Buyer **only at the locations specified on Exhibit "D"** hereto attached at which District has installed delivery structures in accordance with Article 7 hereof

(LC Art. 6 (emphasis added).) Article 7 sets forth additional rights and obligations regarding the delivery of water to the locations specified in Exhibit D:

> District shall, on six (6) months written request from Buyer and upon payment by Buyer to District of the connection service charge of District then in effect, install and thereafter maintain during the term of this Contract delivery structures **at such of the locations designated on Exhibit "D"**, as Buyer shall direct. Said delivery structures shall be and remain the property of District. The cost of repairing any such structure damages by cause other than normal wear or negligence of District shall be paid by Buyer to District promptly upon written demand.

(LC Art. 7 (emphasis added).) Nothing in the record clearly explains the relationship between the locations designated on "Exhibit D" and the locations of Plaintiffs' lands. However, Plaintiffs do not allege that their NSA lands are serviceable by delivery structures at any of the locations designated in Exhibit D as points of delivery.

The right to receive water under the LC is "appurtenant to [the] land," (LC Art. 21), but a Buyer's ability to transfer the appurtenant water entitlement to other lands is limited:

> Project water delivered to Buyer pursuant to this Contract shall not be sold or otherwise disposed of by Buyer for use other than on Said Land without the prior written consent of District.

(LC Art. 20.)

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B. Plaintiffs' Lands and Water Entitlements.

The parcels in question in this suit passed from Occidental to a series of subsequent landowners, each of whom specifically assumed the duties and rights under the LC by signing an "Agreement Amending the Landowner Contract with Belridge Water Storage District for a Water Supply." (Doc. 39, Exs. 3, 4, 5 & 7.) On February 1, 2000, Plaintiffs assumed the terms of the LC for six parcels of land totaling 1599.16 acres, with associated water entitlements of slightly more than 27,000 acre feet. (*See id.* Ex. 7.)

Also on February 1, 2000, Plaintiffs entered into an additional agreement amending their water supply contract. This amendment permits the permanent transfer of an unspecified volume of Plaintiffs' water entitlement so that Belridge could permanently transfer such water entitlement (along with other water entitlements secured from other landowners) to urban users pursuant to a separate agreement. (*See id.* Ex. 6.) This was a one-time transfer for which Plaintiffs were compensated.

Finally, at some point in early 2004, Plaintiffs appear to have purchased an additional 471.27 acres within Belridge. On February 3, 2004, Plaintiffs entered into an agreement with Belridge assuming the rights and duties under the LC for those parcels. (*See id.* at Ex. 7.) The record reflects no additional agreement transferring any portion of the water entitlement appurtenant to these 471.27 acres to other lands.

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C. The Agricultural Interests of the Defendant Directors.

Belridge Directors William Phillimore, Robert Baker, and Larry Starrh are connected with various agricultural enterprises operating within Belridge.

Mr. Phillimore is the President of the Belridge Board. He is also affiliated in one way or another with the following agricultural enterprises:

- Paramount Farming Enterprises, Inc. ("PFE"), Executive Vice President and Chief Financial Officer.
- Paramount Land Company, L.P. ("PLC"), Executive Vice President and Chief Financial Officer.
- Belridge New Farming, LLC ("BNF"), Executive Vice President and Chief Financial Officer.
- Paramount Orchards Partners VI, LLC ("POP"), Executive Vice President and Chief Financial Officer.
- Paramount Farming Company, LLC ("PFC"), Executive Vice President and Chief Financial Officer.[2]

These entities, collectively referred to as the "Paramount Business Entities" are connected to one another in a variety of ways. For example, PFE is the managing partner of PLF, while PFC manages PLC and POP pursuant to a farm management agreement. PLC and POP own land in Belridge.

Mr. Phillimore is also the Executive Vice President and Chief Financial Officer of West Valley Acquisition Corporation and Westside Mutual Water Company, LLC, from each of which Mr. Phillimore receives a salary in excess of $100,000 per year. Plaintiffs assert that these two additional entities may be related to the Paramount Business Entities.

Robert E. Baker is the Secretary of Belridge's Board. He is also employed by PFC as "Ranch Manager" for which employment he

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[2] According to the complaint, Mr. Phillimore receives a salary in excess of $100,000 from PFE, BNF, POP and PFC.

receives a salary of $100,000 per year along with an annual bonus based on the overall profitability of the Paramount Business Entities.

Larry Starrh is the Belridge Board's Treasurer. Mr. Starrh is also a partner in Starrh & Starrh Cotton Growers, which pays Mr. Starrh a salary in excess of $100,000 per year.

D. The Top Contract.

The District's water entitlement from KCWA is sufficient to provide an annual entitlement to lands in both the SA and the NSA. However, because no structures exist to permit delivery to NSA lands, Belridge cannot charge NSA landowners for water. Nevertheless, the District's contract with KWCA still requires that the District pay KWCA for the entire entitlement (i.e., both SA and NSA water). This creates a shortfall in revenue for the District. In response, in 1999 the District entered into a contract (the "Top Contract") with certain entities in Belridge, including entities connected to the three individual Defendants in this case, which allows contracting parties to purchase water that is allocable (but undeliverable) to the NSA lands. The water available for purchase under the Top Contract is known as "Top Water." The parties to the Top Contract purchase Top Water from Belridge and use it on their SA lands.

Specifically, parties to the Top Contract purchase from Belridge portions of the annual entitlement associated with NSA lands as of January 1, 1999, less any portion transferred outside the NSA after January 1, 1999. Each party to the Top Contract is entitled to purchase a certain percentage of the NSA entitlement. The parties to the Top Contract are not required to pay any

transfer charges to change the place of use of Top Water from NSA to SA lands.

In exchange, the parties to the Top Contract agreed to make annual payments to Belridge (the "Buyer's Agency Charge," the "Buyer's District Capital Charge," "The Buyer's Delivery Charge," and the "Buyer's Overhead Charge"). These fees help to cover Belridge's costs (under Belridge's KCWA contract) and the costs of delivering water to the SA lands.

The Top Contract gives each Buyer a right of termination under certain circumstances by specified dates. These dates have expired and no Buyers exercised their right of termination.

Belridge New Farming LLC (62.84%), Starrh & Starrh Cotton Growers (16.61%), and Paramount Land company (14.46%) held the three largest phases of the Top Contract. The remainder is held by others.

The operative effect of Plaintiffs' proposed transfer from NSA to SA lands would be to decrease the volume of water available for distribution under the Top Contract.

E. Pre-Existing NSA Water Transfer Policy.

On May 3, 1999, Belridge adopted a policy regarding the permanent transfer of water from the NSA to the SA. The policy provides "that no transfer fee should be charged for transfers from the NSA to the SA unless the transfer is a stepped transaction, i.e., where entitlement is transferred from the NSA to the SA and then the SA land owner permanently transfers entitlement outside the District within a five year period from the transfer from the NSA to the SA." (SAC at ¶91.)

F. Plaintiffs' request to use NSA water on SA lands.

Plaintiffs requested permission to use the water entitlements associated with their NSA lands on SA lands. In order to obtain permission to use NSA-attributable water on SA land, Plaintiffs' Landowner Contracts must be amended. If such amendment is not permitted, Plaintiffs cannot use their water entitlements.

On January 10, 2005, Plaintiffs sent a letter to the Board, notifying the Board that they intended to "request to have [their] non service area water activated into the service area. More specifically, [they] plan on farming with this water with Sandridge Farms and or other existing land owners and we depend on this water for the economic use of our lands in the district." (Doc. 18, Hughes Decl., Ex. D.) The letter went on to state:

> We have been informed of a series of meetings the district has had regarding two requests that land owners have made in early 2004. The two land owners are Sandridge and Chevron. We have been made aware of an identical request from a land owner, Stiefvater, which was approved under the same Board Policies that are currently in place. I have been informed that several of the current Board Members have been participating in discussions, talked to the manager and have voted to delay the transfer of this water. It appears these Board members currently may have free use of about 10,000 acre feet of water of this character through a unique arrangement set up by the Board and called top contracts. If the foregoing is true, the value of the top contracts of these Board Members is in excess of 10 million dollars assuming a value of $1,000 per acre foot.

(*Id.*)

G. The Allegedly Improper/Unlawful Vote.

On January 11, 2005, the Board held a regularly scheduled board meeting. The agenda for that meeting referenced the following item:

Legal Counsel:

(a) Report re: Charge for Permanent Transfers from Non-service Area to Service Area.

(Doc. 25, Carlson Decl., Ex. 7). No vote on this issue was taken during the January 11, 2005 meeting. Instead, the meeting was adjourned until February 16, 2005 to allow time for public comment and for the board to consider the matter.

The agenda for the February 16, 2005 meeting includes the following modified agenda item:

Other Business:

a. Policy re: Permanent Transfer of Annual Entitlement from Non-Service Area to Service area.

(Doc. 19, Req. for Judicial Notice, Ex. C.)

On February 16, 2005, the Board voted 3-2 to prohibit amendments to Landowner Contracts that would transfer water from NSA land to SA land. The three votes in favor of the prohibition were Defendant Directors William Phillimore, Robert Baker and Larry Starrh.

On March 18, 2005, in accordance with the exhaustion requirements of the Brown Act, Cal. Gov. Code § 54960.1, Plaintiffs sent a letter to the Board demanding that the action be nullified because the vote violated the terms of the Brown Act. On April 18, 2005, the Board refused to nullify the vote.

H. Past & Pending Transfers and Sales of Water Entitlements From the NSA.

The complaint alleges that several permanent transfers of water entitlements from the NSA have been permitted in the past. For example, the Monterey Agreement "provided for the permanent transfer of 130,000 Acre feet of SWP water entitlement from

agricultural water users to Urban Users...." (SAC ¶82.) The entire Board voted to amend the landowner contracts to permit these transfers. As part of the implementation of the Monterey Agreement, Belridge and Plaintiffs "executed an amendment to their landowner contract which authorized the permanent transfer of a portion of the Plaintiffs' annual entitlement for transfer outside of the District...." (*Id.* at ¶83.) Plaintiffs were compensated in the amount of $500,001.00 for 710.5 acre feet. (*Id.* at ¶¶83-85.)

In addition, "[s]ince 1986, 38,916 Acre feet of water entitlement has been transferred from the NSA to the SA. These transfers have included members of the Top Contract. Over 6000 acre feet of annual entitlement has been transferred outside of the NSA to the SA since the Top Contract became effective." (*Id.* at ¶88.) The SAC further specifics:

> 89. Starting as early as March 6, 1990, Paramount Farming Company requested from the Board the right to transfer water entitlement outside the District. Again on December 4, 1990, Paramount Farming Company asked the Board to develop programs to allow for water transfer outside of the District. Legal Counsel advised at the time that uses of water outside the District would require a finding that there was no need for the water within the District.
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> 90. On February 14, 1999 Mr. Scott Hamilton of Paramount Farming Company notified the then District Manager Paul Hendrix by fax that Paramount had added 219.88 acre feet of NSA water entitlement and further notified the District that Paramount Farming Company would like to participate to the maximum extent possible in entitlement sales. In other words, Paramount Farming Company was interested in selling as much of its water entitlement as it could, and using Plaintiffs' and other NSA landowners' water entitlement and water on its (Paramount's) lands in the SA. Paramount's interested Board members frustrated the transfer by NSA landowners of entitlement from the NSA to the SA land to preserve water entitlement available to Paramount through a water transfer process known as

> the Top Contract. The parties to the Top Contract are an exclusive club that the Board has allowed to transfer water entitlement from the NSA to the SA to the exclusion of the owners of that entitlement.
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> 92. Currently pending is a transfer of 16,000 AF of entitlement from Berrenda Mesa Water District to Coachella Valley Water District and Desert Water Agency who are SWP contractors. Berrenda Mesa Water District is located to the north of Belridge. Plaintiffs are informed and believe that one or more of the Paramount Business Entities own land in Berrenda Mesa and have entitlement allocated to those lands, and that 3,000 AF of the 16,000 AF of entitlement being transferred from Berrenda Mesa is entitlement allocated and appurtenant to lands in Berrenda Mesa owned or farmed by one or more of the Paramount Business Entities. Coachella Valley Water District and Desert Water Agency are paying $3,000.00 [per] AF for entitlement being transferred from Berrenda Mesa. The very parties who are preventing the permanent transfer of NSA entitlement to the SA are transferring water outside the District to replace water entitlement that they have sold from another District.
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> 93. At the November 1, 2005 Board Meeting, the General Manager reported that Paramount Farming Company had requested and was granted authorization to transfer 3,000 AF of State Water Project entitlement from the District to Berrenda Mesa Water District. Paramount is receiving $3,000 per acre foot of water entitlement sold while holding on to the Plaintiffs' water entitlement through transfer policy manipulation....

I. Belridge's Previous Attempts to Purchase and Retire NSA Water Entitlements.

The SAC also alleges that Belridge has purchased and retired NSA Water Entitlements in the past. For example, in 1986 Belridge acquired 9,600 AF of NSA water entitlement "due to Land Owner Contract Terminations." This entitlement was redistributed to the SA. (SAC at ¶100.) In addition, in April 1994 Belridge sent questionnaires to all owners in the NSA inquiring whether the landowners wished to terminate their water service contracts with the District. (*Id.* at ¶101.) Alternatively, Belridge inquired whether the landowners "wished to transfer some or all

their entitlement to parcels they may own within the current SA, or if they desired a landowner meeting to obtain more information regarding their water service contract(s)." (*Id.*)

On May 26, 1994, Mr. Meeker on behalf of Plaintiffs responded to the inquiry stating that "Our present opinion is not to terminate our contract; however, we need further information before we can make a firm commitment." (*Id.* at 102.)

Plaintiffs also allege that in "August and September of 1995 at least 6 property owners terminated their water supply contract rights with the District" and that the "District has foreclosed on property in the NSA for failure to pay assessments and transferred the entitlement from the NSA to the SA." (*Id.* at 105.)

J. Plaintiffs' Relationship with Sandridge Partners.

On March 12, 2005, approximately one month after Plainitffs filed the initial complaint in this case, Plaintiffs and Sandridge Partners ("Sandridge") executed a contract for the sale of Plaintiffs' NSA land and water entitlement to Sandridge. (Meeker Decl. ¶5, Ex. A; Vidovich Decl. ¶9.) "The Contract allocated over 96% of the purchase price to the water rights and less than 4% to the land itself." (Doc. 70 at 6; Meeker Dec;. ¶12.) On September 6, 2005, Sandridge sent a letter to the Belridge District manager, Greg Hammett, inquiring about building out water transportation facilities to Sandridge/Plaintiffs' NSA land. (Vidovich Decl. ¶¶3 & 14, Ex. A.) Sandridge requested confirmation that "Plaintiffs' and Sandridge's lands would be treated the same as all other SA lands." (*Id.* at ¶14.)

On September 13, 2005, Hammett responded in writing stating that Sandridge's request did not make it onto the September 7, 2005 Board Meeting Agenda, but that the topic was discussed during his "manager report." (Vidovich Decl at ¶15, Ex. B.) Hammett explained that the Board would require detailed plans and specifications (prepared at Sandridge's expense) before the request could be considered. (*Id.* at ¶15, Ex. B.) Hammett's letter did not respond to Sandridge's request for "assurance" that Plaintiff and Sandridge would be treated the same as all other landowners. (*Id.*)

On October 25, 2005, Sandridge sent another letter to Hammet, explaining that Sandridge sought assurances that, if it invested in the construction of water transportation facilities, Sandridge's SA lands would be treated the same as all other SA lands. In other words, Sandridge wanted assurances that it would be able to use its water anywhere it wanted. *(See id.* at ¶17, Ex. D.)

On November 22, 2005, Sandridge received a letter from two board members, Defendants Starrh and Baker, which requested specific information about the planned construction project, including a map; right of ways; crops to be grown; demand in gallons; the irrigation system to be used; and the desired construction schedule. The letter contained no response to the request for written assurance that Sandridge's NSA lands would be treated the same as the other NSA lands in Belridge. (*Id.* at ¶18, Ex. E.)

A Belridge board meeting agenda for February 7, 2006, dedicated time to Sandridge's request to build out water

transportation facilities. (Richie Decl., Ex. 1.) The Board tabled the issue and went into a closed session. *(Id.; see also,* Vidovich Decl. ¶21, Ex. F.) After the closed session, Defendant Phillimore announced in open session that the issue would not be taken up by the board because Plaintiffs' first amended complaint, filed February 6, 2006, raised the issue in this litigation. (Ritchie Decl., Ex. 2.) Soon thereafter, Mr. Hughes, counsel for Belridge, sent a letter to Plaintiffs' counsel stating that "[t]he request of Sandridge Partners is now apparently the subject of litigation and the District will respond in the appropriate fashion." (Carlson Decl. Ex. 29.)

III. STANDARD OF REVIEW - MOTION TO DISMISS

Fed. R. Civ. P. 12(b)(6) provides that a motion to dismiss may be made if the plaintiff fails "to state a claim upon which relief can be granted." However, motions to dismiss under Fed. R. Civ. P. 12(b)(6) are disfavored and rarely granted. The question before the court is not whether the plaintiff will ultimately prevail; rather, it is whether the plaintiff could prove any set of facts in support of his claim that would entitle him to relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. CNN, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (citations omitted).

In deciding whether to grant a motion to dismiss, the court "accept[s] all factual allegations of the complaint as true and draw[s] all reasonable inferences" in the light most favorable to

the nonmoving party. *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); *see also Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9th Cir. 2002). A court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

IV. DISCUSSION

A. Requests for Judicial Notice.

1. Defendants' Requests.

Defendants request that the court take judicial notice of the following documents: The "Top Contract"; Board of Directors' Minutes and Agenda of February 16, 2005; A portion of the Board of Directors' Packet for Board Meeting of February 16, containing a letter dated January 10, 2005; Board of Directors' Minutes of November 1, 2005; Board of Directors' Minutes of February 1, 2005; Board of Directors' Minutes of January 11, 2005; a Letter from Raymond Carlson, dated February 15, 2006; Plaintiffs' Landowner Contracts as submitted by Plaintiffs, attached to the August 26, 2005 Declaration of Raymond L. Carlson. (*See* Doc. 66, filed May 9, 2006.)

A court may take judicial notice of facts "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Under certain circumstances, a court may take judicial notice of a document relied upon in the complaint and/or matters

of public record outside the pleadings, without converting a motion to dismiss into a motion for summary judgment. *See In re Silicon Graphics Inc. Secs. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); *MGIC Indem. Corp v. Weisman*, 803 F.2d 500, 503 (9th Cir. 1986).

Under these rules, the Top Contract is judicially noticeable because it is referenced in Plaintiffs' complaint and its authenticity is not challenged.[3]

Minutes from an irrigation district's board meeting are public records subject to judicial notice in a motion to dismiss, *see Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 724-25 (E.D. Cal. 1993), but only if "the accuracy of the minutes cannot be reasonably questioned," Fed. R. Evid. 201(b)(2). Plaintiffs do not object to the court taking judicial notice of the Board minutes.

Defendants also submit for judicial notice a letter from Plaintiffs to Defendant dated January 10, 2005. This letter was contained within an agenda packet distributed to Belridge's Board. As such, it is part of the public record of the Board's proceedings and is subject to judicial notice.

Defendants also request judicial notice of a letter from Raymond Carlson to Belridge, dated February 15, 2006, which constitutes Plaintiffs' request for approval to transfer NSA water to SA lands, along with various landowner contracts submitted by Plaintiffs. Although these documents are not

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[3] Plaintiffs note that the copy attached to Defendants' motion to dismiss is not certified, but do not object to the court taking judicial notice of this document.

technically public records and are therefore not judicially noticeable, they are admissible on a motion to dismiss under the "incorporation by reference doctrine," whereby a district court may consider documents "whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading." *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). The Ninth Circuit has also extended the application of this doctrine "to situations in which the plaintiff's claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint." *Id.*

Defendants request for judicial notice is **GRANTED** as to all documents for which such notice was requested.

2. Plaintiffs' Requests.

Plaintiffs request that the court take judicial notice of more than forty documents filed throughout the course of this litigation. Plaintiffs first request that the court take judicial notice of Exhibits 1 through 8 of the Declaration of Raymond L. Carlson, filed July 22, 2005 in connection with the first motion to dismiss. (Doc. 25).

Exhibit 1:	"Minutes of An Adjourned Regular Meeting of the Board of Directors of Belridge Water Storage Held: January 11, 2005" received from Defendant, Belridge Water Storage District ("District") on February 16, 2005.

Exhibit 2:	Letter dated February 22, 2005 sent by Raymond L. Carlson to to Joseph Hughes, Assistant Secretary and attorney for the District -- a "request made to the District under the California Public Records Act for the listed records."
Exhibit 3:	"Belridge Water Storage District Board of Directors Meeting Roll Call (2-16-05)" with handwritten notes, received by Carlson in response to a request for records.
Exhibit 4:	"Belridge Water Storage District Adjourned Regular Meeting of the Board of Directors Wednesday February 16,2005 1:30 P.M. Agenda", with handwritten notes, received by Carlson in response to a request for records.
Exhibit 5:	A letter dated March 7, 2005, received from Mr. Hughes.
Exhibit 6:	"Belridge Water Storage District Minutes of a Regular Meeting of the Board of Directors of Belridge Water Storage District Held: January 4, 2005", received from the District on January 11, 2005.
Exhibit 7:	"Belridge Water Storage District Adjourned Regular Meeting of the Board of Directors Tuesday January 11, 2005 1:30 P.M. Agenda."
Exhibit 8:	An e-mail dated March 15, 2005, received by Raymond Carlson from Joseph Hughes.

Exhibts 1, 3, 5, 6, and 7 are public records that are judicially noticeable. However, Plaintiffs have provided absolutely no justification for taking judicial notice of Exhibits 2, 4, and 8, which are correspondence between counsel and appear not to be part of the public record in any way. The request is **GRANTED** as to Exhibits 1, 3, 5, 6, and 7, but **DENIED** as to 2, 4, and 8.

Plaintiffs also request judicial notice of Exhibits 1 through 38 attached to the Declaration of Raymond L. Carlson filed March 26, 2006. (Doc. 57)[4] Exhibits 1 through 8 are various landowner agreements and amendments thereto entered into by Plaintiffs and Belridge. These are judicially noticeable public records. Exhibit 9 is a copy of the "Standard Provisions for Water Supply Contracts for Supply of State Project Water," an official Kern County record that is judicially noticeable. Exhibit 10 is a copy of Belridge Resolution 749 a public record that is also judicially noticeable. Exhibits 11, and 11A are communications from Belridge to various landowners in Belridge, including a memorandum and two questionnaires. These documents are also arguably public records and are therefore judicially noticeable. Similarly, the following Exhibits are judicially noticeable Belridge public records:

Exhibit 16:	The minutes of the February 16, 2005 Belridge Board meeting.
Exhibit 17:	A spreadsheet handed out at the February 16, 2005 Board meeting entitled "Acre-Feet transferred from Non-Service Area."
Exhibit 20:	A memorandum dated April 21, 1995 from the Belridge Board president to NSA land owners.
Exhibit 26:	The minutes of the October 4, 2005 Belridge Board meeting.
Exhibit 30:	A memorandum dated January 11, 2005 from Greg Hammett and Joseph D. Hughes to the Belridge Board.

[4] There are actually 39 exhibits attached to Carlson's March 26, 2006 declaration, but Plaintiffs here only request that the court take judicial notice of the first 38. (*See* Doc. 77.)

Exhibit 31: Minutes of the November 1, 2005 Belridge Board meeting.

Exhibit 32: Minutes of the January 4, 2005 Belridge Board meeting.

Exhibit 33: Minutes of the January 11, 2005 Belridge Board meeting.

Exhibit 34: The agenda for the February 16, 2005 Belridge Board meeting.

Exhibit 35: The minutes of the January 11, 2005 Belridge Board meeting.

Exhibit 36: The agenda for the February 1, 2005 Belridge Board meeting.

However, the remainder of the exhibits attached to the March 26, 2006 Declaration are not judicially noticeable. Exhibit 12 is California Land Trust check #008 dated May 11, 1987 for $10,683.56 and a TSD, Inc. check 284 dated July 17, 1987 for $2,435.15. Plaintiffs do not indicate how these checks are judicially noticeable (e.g., there is no indication that they are public records). The same holds for Exhibit 13, a memorandum from Clayton Brants to TSD Land/California Land Trust. Exhibits 14 and 15 are communications between Belridge and Plaintiffs. Again, Plaintiffs do not articulate a basis for taking judicial notice of these documents. The same applies to Exhibit 18 (a memorandum from the manger of Berrenda Mesa Water District to land owners in Berrenda Mesa) and Exhibit 19 (a Sale Agreement between Berrenda Mesa Water District, Coachella Valley Water District and Desert Water Agency), and to Exhibits 21, 22, 23, 24, 25, 27, 28 and 29, all communications between Belridge, Plaintiffs, and representatives of Sandridge. Judicial notice is not a mechanism by which a party can offer into evidence documents that do not fall into one of the specific categories

articulated in Federal Rule of Evidence 201.

Plaintiffs next request judicial notice of Exhibit 37, a list of electronic files comprising the agendas for the 2005 Belridge Board meetings, obtained in electronic form from Belridge on March 17, 2006. Plaintiffs do not indicate why this document should qualify as a "public record" or otherwise satisfies Rule 201.

Finally, Plaintiffs request judicial notice of Exhibit 38, the contemporaneous hand written notes taken by Assistant Secretary LaDonna Hickernell at the Belridge Board meeting held on February 16, 2005, obtained in response to a California Public Records Act request propounded on Belridge by letter dated February 22, 2005. This document is arguably a public record, but is judicially noticeable only for its existence, not for the truth of the matters asserted within the handwritten notes.

The motion regarding Exhibits 1-39 of the Carlson is **GRANTED** as to Exhibits 1-10, 11, 11A, 16-17, 20, 26, 30-36, and 38, but **DENIED** as to all other exhibits.

Next, Plaintiffs request that the district court take judicial notice of Exhibits 1 and 2 of the Declaration of Leslie Richie, filed March 26, 2006. (Doc. 58.) Leslie Richie is a representative of Sandridge. Exhibit 1 is a copy of the agenda for the February 7, 2006 regular meeting of the District Board. This is a public record and is therefore judicially noticeable. Exhibit 2 is a transcript of that portion of the meeting during which the Board addressed Sandridge's request to build out water delivery facilities. Members of the public are permitted to tape record public meetings under California Government Code

§ 54953.5. Defendants do not dispute the accuracy of the transcript, but they assert that it is an incomplete excerpt. With that understanding, the excerpt is judicially noticeable as evidence of what was said during the excerpted portion of the hearing.

Plaintiffs then request that the district court take judicial notice of Exhibits A and B to the Declaration of Raymond L. Carlson, filed June 12, 2006. (Doc. 71) Exhibit A is a contract between Sandridge and Plaintiffs pursuant to which Sandridge agreed to purchase Plaintiffs' land. This is judicially noticeable under "incorporation by reference doctrine." *Knievel*, 393 F.3d at 1076. Exhibit B is a letter sent by Plaintiffs to the Belridge District Manager. There is no indication that this document was made a part of the public record and therefore the motion is **DENIED** as to Exhibit B.

Finally, Plaintiffs separately request that the court take judicial notice of the "Agenda of Special Meeting of Belridge Board held on May 23, 2005" (Ex. 40), and the "Minutes of Special Meeting of Belridge Board held on May 23, 2005 (Ex. 41)." As these documents are public records, they are judicially noticeable. The request is **GRANTED** as to these two documents.

B. Motion to Dismiss.

Defendants move again to dismiss all but two of the claims in this case. (Defendants do not challenge the Political Reform Act (First Claim) or Unfair Competition (Eleventh Claim) causes of action, the only two claims to survive the prior motion to dismiss.)

1. California Government Code § 1090 (Second Claim).

Section 1090 of the California Government Code prohibits Directors of a water district from being "financially interested in any contract made by them in their official capacity, or by any body or Board of which they are a member." Cal. Gov. Code § 1090 (emphasis added). Section 1090 "encompass such embodiments in the making of a contract as preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitations for bids." *Millbrae Assoc. for Residential Survival v. Millbrae*, 262 Cal. App. 2d 222, 237 (1968).

Plaintiffs claim based upon California Government Code § 1090 was previously dismissed on the ground that the February 15, 2005 vote did not "make" a contract. The January 17, 2006 memorandum decision held:

> Plaintiffs appear to concede that the Defendant directors did not actually cause the Top Contract to be created. The Top Contract was drafted and signed prior to any of the Defendant Directors becoming members of the Board.
>
> Plaintiffs also appear to concede that the February 16, 2005 vote did not expressly "make" a contract. Rather, Plaintiffs assert that:
>
> > The Board's action at the February 16, 2005 special Board meeting amended the Top Contract into a permanent contract whereby all of the NSA entitlement is permanently made available to the Buyers under the Top Contract, effectively transforming the Top Contract from an interim or temporary measure into a permanent arrangement.
>
> (Doc. 1, Compl., at ¶77.) Essentially, Plaintiffs argue that the adoption of the policy was a de facto contract amendment, "insuring a supply of seized NSA water to Top Contract buyers." (Doc. 25 at 12.) Plaintiffs offer no legal support for the proposition that liability under § 1090 may be triggered by such an

implied amendment. (The appropriate legal remedy appears to be under the PRA.)

Plaintiffs also suggest that *Milbrae* and its progeny call upon courts to read [] the statutory language liberally. For example, in *Thomson v. Call*, 38 Cal. 3d 633 (1985), a complex, multi-party contract transaction was found to be "part of a single multiparty agreement." It was therefore improper for a city councilman, whose own property was acquired in one of the more tangential transactions, to have participated in the making of any of the interrelated contracts:

> [T]he prospect that performance of the contract would involve acquisition of the [councilman's land and conveyance of that land to the city was contemplated by all parties....[T]he policy goals of section 1090 support the rule that public officers "are denied the right to make contracts in their official capacity with themselves or to become interested in contracts thus made."

Id. at 645. A similarly broad view of the meaning of the term "contract" was taken in *People v. Honig*, 48 Cal. App. 4th 289 (1996). In that case, a state educational official was married to the founder and director of a nonprofit corporation involved in education. At this official's direction, grants were made by the state to certain school districts. But, these funds were actually used to pay the salaries of employees who worked for his wife's nonprofit organization. The official was found to have violated § 1090 because he had indirectly caused the improper contracts to be made. The *Honig* court reasoned:

> In considering conflicts of interest we cannot focus upon an isolated 'contract' and ignore the transaction as a whole. It appears clear that the payment of DOE funds to the school districts, the districts' payment of those funds to QEP employees in the form of continued salaries and benefits, and the employees' work for QEP, were in performance of single multiparty agreements. In short, defendant simply used the school district contractors as conduits to funnel DOE funds to individuals as compensation for working for his wife's corporate employer. The use of a third party as a contractual conduit does not avoid the inherent conflict of interest in such a transaction.

Id. at 320. *See also People v. Gnass*, 101 Cal. App. 4th 1271, 1293 (2002)("[T]he test is whether the officer or employee participated in the making of the contract in his official capacity.").

> Although these cases take a broad view of the term contract, Plaintiffs suggest an even broader interpretation of § 1090. Under Plaintiffs' interpretation, any vote of a government official that advances an independent existing contractual interest held by that government official would be prohibited by § 1090. Plaintiffs essentially argue that § 1090 should be read to subsume any action that advances a contractual interest. This in effect rewrites § 1090. (Noticeably, § 1090 lacks the "public generally" exception which threatens Plaintiffs' PRA claim.) The Belridge Board's vote on the transfer of NSA water is not a "contract made" by the Board, unless an agreement between the district and the Top Contractors results from the vote. Defendants' motion to dismiss the § 1090 claim is **GRANTED WITH LEAVE TO AMEND.**

(Doc. 48 at 38-41.)

In the SAC, Plaintiffs advance four separate theories to support a renewed section 1090 claim, arguing that:

(a) "The February 16, 2005 Board Meeting was the 'making' of a contract under the guise of being a policy change. The law does not reward form over substance." (SAC at ¶28.)

(b) "The Top Contract is void under § 1090 because it requires the making of a contract each year." (SAC at ¶31.)

(c) "The Joint Defense Agreement is a void contract under § 1090 because it is the making of a contract." (SAC at ¶32.)

(d) "The November 1, 2005 Board Decision is the making of a contract and void under § 1090." (*Id.*)

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a. February 16, 2005 board meeting as the "making" of a contract.

Alleging that the February 16, 2005 Board Meeting was "a de facto amendment to the Top Contract" (SAC at ¶29), Plaintiffs essentially advance the same argument that was rejected in the January 17, 2006 memorandum decision. Plaintiffs offer no new legal authority or argument that would warrant departure from the previous ruling. No remedy is available under § 1090 with regard to the resolution passed at the February 16, 2005 board meeting.

b. Does the Top Contract require the making of a contract each year?

Plaintiffs next argue that the "Top Contract is void under § 1090 because it requires the making of a contract each year." (SAC at ¶31.) Specifically, the standard provisions set forth in the Top Contract require the Board to determine charges for water distribution each year. Plaintiffs maintain that this procedure requires the board to "re-make" the top contract each year.

Plaintiffs cite *City of Imperial Beach v. Bailey*, 103 Cal. App. 3d 191 (1980) in support of their position.[5] In that case, the operator of a concession stand under contract with the city was later elected to become a member of the city council. *Id.* at 194. A provision of the concession contract provided that on the fifteenth anniversary of the agreement, ownership of the building in which the concession was housed would pass to the city and

[5] Plaintiffs also cite Volume 84, page 34 of the Opinions of the California Attorney General as additional support. The California Attorney General's opinions are an advocate's summary of California law and are not binding authority.

that "[a]t the end of said fifteen year period City may reasonably adjust the rate of payment to be paid by Operator to City to reflect the fact that City owns the building." *Id.* When the concession contract came up for renewal, the operator was still a member of the city council. The city refused to renew the contract, citing § 1090, and sought a declaration as to the legality of its refusal. *Imperial Beach* first held that the renewal would constitute the making of a contract which would violate § 1090. The court reasoned that adjustment of the rate on the fifteen year anniversary would require a "negotiation" prohibited by § 1090, even if the city set the rate unilaterally (i.e., without negotiating with the concession) and even if the conflicted council member abstained from voting. *Id.* at 195. The critical inquiry was whether the council was required to approve the rate: "It is not her participation in the voting which constitutes the conflict of interest, but her potential to do so." *Id.*

Plaintiffs allege that the Top Contract must be voided under § 1090 because it "require[s] the Board to determine charges for water distribution in the October Board Meeting each year," just like the *Imperial Beach* contract required "a concession price be inserted for each year the contract was in force." (SAC at ¶¶ 161-62.) First, Plaintiffs misrepresent the nature of the contract in *Imperial Beach*. As discussed, that contract permitted a rate adjustment on the fifteen year renewal date. Nothing in *Imperial Beach* suggests that a "concession price [must] be inserted for each year the contract was in force." Moreover, while the contract in *Imperial Beach* was explicitly

subject to renewal on the fifteen year anniversary, the Top Contract contains no annual renewal provision. Plaintiffs correctly point out that charges for water distribution must be calculated each year, and appear to suggest that this annual calculation constitutes the type of "negotiation" prohibited in *Imperial Beach*. However, the charges for water distribution are calculated according to a pre-determined mathematical formula and are part of the inherent functions of a water district in providing water services to its members. Moreover, nothing in the Top Contract speaks of annual renewal of the contract at the time of the rate-setting, nor is it alleged that the Top Contract requires Board approval of the new rate.

c. The Joint Defense Agreement.

Plaintiffs further argue that the "Joint Defense Agreement is a void contract under § 1090 because it is the making of a contract." (SAC at ¶32.) Defendants respond that the making of this contract is not barred by § 1090 because of "the rule of necessity," a common law defense that provides "where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that members may have a personal interest in the result of the action does not disqualify them in performing their duty." *Gonsalves v. City of Dairy Valley*, 265 Cal. App. 2d 400, 404 (1968). California courts have applied this rule to § 1090 claims. *See, e.g., Eldridge v. Sierra View Local Hospital Dist.*, 224 Cal. App. 3d 311, 319-23 (1990).

Defendants argue that a government entity must defend itself

and indemnify its directors against lawsuits. *See* Cal. Gov. Code §§ 825, 995. Defendants are correct that Plaintiffs' view of the law "would lead to the absurdity of a plaintiff being able to stop any government entity from defending itself merely by also suing the directors who need to deal with the defense" thereby rendering any joint defense agreement between the entity and the Directors void under § 1090. (Doc. 65 at 7.) Plaintiffs' reading of § 1090 cannot be countenanced.

d. November 1, 2005 Board Decision.

Finally, Plaintiffs maintain that "The November 1, 2005 Board Decision is the making of a contract and void under § 1090." On that date, the SAC alleges that an amendment to a water supply contract for Paramount Farming Company was "suggested" to the Board. Defendants respond by pointing to the minutes from that meeting which indicate that Paramount did not suggest an amendment to its water supply contract. Rather, Paramount requested that the Board approve a landowner transfer pursuant to standard District policy. (*See* Nov. 1, 2005 Board Minutes.) Plaintiffs cite no authority to support the proposition that such an approval constitutes the making of a contract.[6]

[6] Assuming that the judicially noticeable minutes accurately reflect what transpired at the meeting, the Board did not make a contract on November 1, 2005. Rather, the Board exercised its duty to approve landowner contracts, an event that is more appropriately challenged under the Political Reform Act. Plaintiffs themselves concede that the two interested Defendant Directors recused themselves from this vote, so no PRA violation occurred.

None of the theories advanced by Plaintiffs support a cause of action under California Government Code § 1090. Defendants' motion to dismiss this claim is **GRANTED WITHOUT LEAVE TO AMEND.**

2. Common Law Conflict of Interest (Third Claim).

Plaintiffs' second claim is that the conduct of the interested directors constitutes a violation of the common law prohibition against conflicts of interest. "The common law doctrine against conflicts of interest prohibited public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1171 (1996). But, the common law doctrine has been superceded by the Political Reform Act (PRA), and survives only to the extent that violations are not specifically governed by an applicable PRA provision or regulation. 1 Witkin, Summary of California Law (10th ed. 2005) Contracts §§ 650, 652 ("state statutes, generally declaratory of the common law, cover the field"); *see also Victory Oil Co. v. Hancock Oil Co.*, 125 Cal. App. 2d 222, 229 (1954)(discussing California's Code of Civil Procedure and holding that the common law remains in force "except so far as it... has been modified by statute...."). In *Clark*, the common law governed in part because PRA was found inapplicable, as the alleged conflict did not involve a financial interest. 48 Cal. App. 4th at 1173. Here, however, the alleged conflict is financial and the PRA "covers the field."

Plaintiffs assert generally that "[t]he great number of conflicts in this case, the length of time over which they

occurred, and the great variety of contexts in which they arose, are not all envisioned by or contemplated by the [PRA]." (Doc. 85 at 12.) But, Plaintiffs point to no examples of conflicts that do not involve financial interests and none could be discovered in the record.[7]

During oral argument, Plaintiffs relied upon the recent decision in *Pajaro Valley Water Management Agency v. Amrhen* 46 Cal. Rptr. 3d 476 (Cal. App. 6 Dist. 2006). In that case, a water management agency sought a judicial determination that its ordinance increasing a groundwater augmentation fee charged to operators of wells within its jurisdiction was valid. Objectors challenged the ordinance on many grounds, including the PRA and common law conflict of interest. Plaintiffs assert that *Pajaro* supports their claim for common law conflict of interest because the *Pajaro* court treated the common law claim as a substantive issue and did not discuss whether it had been superceded by the PRA. Plaintiffs' reliance is misplaced for several reasons. First, *Pajaro* did indirectly address the issue of PRA supercession in its discussion of *Clark*, 49 Cal. App. 4th at 1172-73:

> Objectors assert in passing that Directors Capurro and Gallino were disqualified by a common law conflict of interest as discussed in *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1172, 56 Cal.Rptr.2d 223 (Clark). Objectors merely quote a passage from that case, cite an opinion by the Attorney General on

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[7] Again, Plaintiffs cite summaries of California law authored by the California Attorney General's Office. These summaries are not binding on California law, nor are they particularly persuasive, as they do not apply the general principles of law to cases with factual circumstances even remotely parallel to those presented here.

> the same general subject, and assert that the ordinance is void "since a common law conflict of interest existed at the time Ordinance 2003-01 was adopted." Assuming this is a sufficient presentation to tender an issue for our consideration, it falls far short of persuading us that the ordinance is void. In Clark a city council member was held to have acted under a common law conflict of interest by voting against a development that would interfere with ocean views from his rented home, and against the proponents of which he harbored personal animosity. (*Clark, supra,* 48 Cal.App.4th at pp. 1172-1173, 56 Cal.Rptr.2d 223.) The [Clark] court fell back on common law principles because the facts did not establish a financial interest in violation of the PRA. (*Id.* at p. 1173, fn. 19, 56 Cal.Rptr.2d 223.) The case bears no material similarity to this one.

46 Cal. Rptr. 3d at 494 (emphasis added). Moreover, *Pajaro* is no longer good law, as rehearing has been granted and the opinion has been deemed not citeable.

Defendants' motion to dismiss the common law conflict of interest claim is **GRANTED WITHOUT LEAVE TO AMEND.**

3. Inverse Condemnation (Fourth Claim).

Plaintiffs included a claim for inverse condemnation in their initial complaint. That claim was dismissed with leave to amend on the grounds that Plaintiffs could not establish that they possess a vested property right. The January 17, 2006 memorandum decision held:

> Before any of [the Lucas, Penn Central, etc.] standards come into play...the court must as a threshold matter, determine whether Plaintiffs possess a vested property right:
>
> > The first step in [a] taking analyses is to determine whether there is a property right that is protected by the Constitution. *See, e.g., Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 54-55 [additional citations]. In *Public Agencies*, a taking case, the Court held that the contractual right at issue "did not rise to the level of

> 'property'" and "[could] not be viewed as conferring any sort of 'vested right.'" 477 U.S. at 55. Without a property right, there could be no "taking within the meaning of the Fifth Amendment." *Id.* at 55-56.

Peterson v. United States Dept. of Interior, 899 F.2d 799, 807 (9th Cir. 1990).

The parties expend a great deal of energy discussing whether Belridge's conduct in this case constitutes a per se taking or satisfies the requirements of the *Penn Central* test. The parties totally neglect, however, to address the threshold question of whether the right Plaintiffs claim was condemned by Belridge is of a type that is protected by the California or United States constitutions.

Unless Plaintiffs possess water rights separate and distinct from those granted to them under their landowner contracts, Plaintiffs' entitlement (or "right") to SWP water is defined exclusively by that contract. Here, Plaintiffs do not claim to possess any vested water rights other than their entitlement as a District landowner to contract for water service under the landowner contracts, nor do they claim that any provision of state law conveys upon them or creates any other form of water right. The terms of the contracts solely determine the nature of any water rights Plaintiffs hold.

Here, Plaintiffs claim that they have been injured by Defendants' decision to prohibit transfers from the parcels of land designated in the landowner contracts to other parcels of land within Belridge. Yet, the Landowner Contracts specifically prohibit the transfer of water entitlements without express written permission from Belridge.

> Project water delivered to Buyer pursuant to this Contract ***shall not be sold or otherwise disposed of by Buyer for use other than on Said Land without the prior written consent of District***.

(LC Art. 20.) The contract does not contain a provision that the District's consent to a requested transfer shall not be unreasonably withheld

Plaintiffs purchased 1599.16 acres of NSA land in early 2000 and an additional 471.27 acres of NSA land in 2004. At the time Plaintiffs executed the LC for the lands purchased in 2000, Plaintiffs entered into an agreement with Belridge that permitted Plaintiffs to transfer some of their NSA water to urban uses. This, however, was a limited, one-time transfer as part of a

larger negotiated transfer of agricultural water entitlements to urban water users.

Plaintiffs assert that Defendants have "seized" their NSA water and suggest that this amounts to a "per se" physical taking of their property. But, again, Plaintiff's right to water is defined by the LC and any applicable amendments. According to these documents, Plaintiffs' only right to water is for their lands in Zones of Benefits (Art. 5(b)), which may be qualified to receive water by following the service connection procedure of Article 7 for locations specified on Exhibit D. Plaintiffs' right to receive and use water under the LC is subject to the further condition that if any water to be delivered is not for use on the lands specified in Plaintiffs' LC, the District's consent must be obtained under Article 20. Plaintiffs have no absolute vested right to transfer their water away from their NSA lands. (Plaintiffs do not allege that they were wronged by Belridge's failure to deliver water to their NSA land.)

Plaintiffs argue in the alternative that they have alleged a regulatory taking because the Board's vote has deprived them of "all economically beneficial use of their property." Plaintiffs suggest that the district court should follow the holding in, *Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313, 318 (2001), where Judge Wiese held that "the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, [has] rendered the usufructuary right to that water valueless, [and has] thus effected a physical taking." The Court of Claims decision has no binding effect in the Eastern District of California. Moreover, the conclusory reasoning in the *Tulare Lake Basin* case is without analytical foundation and is suspect, as it has been criticized in the Court of Claims. *See Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 513 (2005) (criticizing *Tulare Lake Basin* for its failure to engage in any analysis of the contracts which establish the rights in question). In the Ninth Circuit and California, it is the contract that defines the nature and terms of the water right possessed by users of water from the CVP or SWP. *Peterson*, 899 F.2d at 807 ("The first step in both due process and taking analyses is to determine whether there is a property right that is protected by the Constitution."); *Planning and Conservation League v. DWR*, 83 Cal. App. 4th 892, 899 (2000) (SWP contractors are obligated to pay for their contractual entitlements to water "whether the water is delivered or not").

Here, Plaintiffs' contract specifically withholds the right to transfer water without written permission from

> Belridge. In essence, Belridge's vote amounts to an announcement that no such written permission will be granted until further notice. Plaintiffs were offered an opportunity at oral argument to point to any alternative source of a vested property right in this case and were unable to do so. Plaintiffs do not state a claim for inverse condemnation under California law. Accordingly, Defendants' motion to dismiss the state law inverse condemnation claim is **GRANTED WITH LEAVE TO AMEND, subject to Rule 11's requirement that a good faith investigation and analysis provide a basis for the claim of a vested property right in District water.**

(Doc. 48 at 22-26 (emphasis in original).)

Plaintiffs again attempt to plead that they posses vested water rights, this time pointing not only to the Landowner Contracts but to various items of extrinsic evidence.

Plaintiffs' argument is convoluted. They first argue that the District's right to approve transfers of NSA water does preclude "the vesting of Plaintiffs' Right to Water." Plaintiffs maintain that, although "the right to delivery of water is subject to some limitations," such as approval by the Board, these limitations must be "reasonable" and cannot be "arbitrary and capricious." More specifically, Plaintiffs assert that the District's right to approve is subject to the legislative mandate "to equitably distribute water" set forth in California Water Code § 43003, which is the subject of a separate claim in this case. (*See* Doc. 85, Opp'n, at 14-15.)

In support of this argument, Plaintiffs acknowledge the general rule that an individual has no vested property right in a particular benefit where a governmental agency retains discretion to grant or deny the benefit. *See Bernizer v. Ray*, 915 F. Supp. 176, 181 (C.D. Cal 1995) and cases cited therein. However, Plaintiffs assert that an alternative line of authority, *e.g.*,

Kerley Indus., Inc. v. Pima County, 785 F.2d 1444, 1446 (9th Cir. 1986), should apply here. In that case, Kerley, the owner of a chemical plant in Pima County, Arizona applied for an operating permit from the Pima County Air Quality Control District. Initially, a conditional permit was granted, providing Kerley an opportunity to demonstrate that it could comply with air quality requirements. Later, however, the permit was revoked on the ground that the plant violated a Pima County zoning ordinance and the Air Quality District was precluded by law from issuing any permit that violated a zoning ordinance. Kirley filed suit in federal court against the Air Quality Control Board and others, alleging that Pima County deprived it of property without due process by denying its permit without prior notice and hearing. The Ninth Circuit held that Kirley "had sufficient property interest to invoke procedural due process protections," reasoning that:

> Property rights do not arise from simple wants and desires; they must be based on legitimate claims of entitlement. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Property rights are created "and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id.
>
> Arizona law provides for the issuance of conditional permits, such as the one Kerley received, Ariz.Rev.Stat.Ann. § 36-784 (1974); it contains detailed provisions for their suspension and revocation. Ariz.Rev.Stat.Ann. § 36-784.04 (1974). This body of law endowed appellant with a sufficient claim of entitlement to its conditional use permit and the operation of its plant to establish a property right and to trigger the constitutional requirement of due process. Having granted appellant a permit to operate its plant, the county could not take it away arbitrarily, for improper reasons, or without appropriate procedural safeguards. The fact that

> plaintiff's operation might have violated the county's zoning ordinance does not render its interest in the permit any less deserving of constitutional protection. The violation was not conclusively established by the Chief Zoning Inspector's determination. The permit could not be revoked without giving Kerley an opportunity to prove the Zoning Inspector wrong.

Id. at 1445-46 (internal citations omitted).

Plaintiffs assert that the circumstances here are similar to those in *Kerley* because Belridge's right to approve any water transfer is "subject to the legislative mandate to equitably distribute water." (Doc. 85 at 15.) Plaintiffs are comparing apples to oranges. In *Kirley*, the Arizona legislature provided for specific procedures that must be followed prior to the issuance or revocation of a use permit. Accordingly, the Ninth Circuit found that Kerley held a permit and "had sufficient property interest to invoke procedural due process protections." This is very different from concluding that the existence of a substantive, external requirement for equitable distribution of water transforms the Landowner Contract into a vested property right for purposes of inverse condemnation. *Kerley* does not support the proposition Plaintiffs advance.

Plaintiffs also cite *Peterson v. United States*, 899 F.2d 799, 809 (9th Cir. 1990). In that case, a number of water districts challenged the constitutionality of section 203(b) of the Reclamation Act, 43 U.S.C. § 390cc(b), the so-called "hammer clause," which gave water districts holding contracts for Reclamation water the option of either (1) amending their existing contracts to conform with new provisions of the Reclamation Act that closed various loopholes in the Act, or (2) paying "full cost" for any water delivered to leased or owned

landholdings that exceeded the new acreage limitations contained in the revised Act. The water districts maintained that their pre-existing contracts conferred upon them a constitutionally protected property interest in the delivery of subsidized water to leased tracts of any size. *Id.* at 807. Specifically, the water districts claimed, among other things, that their contracts must be interpreted "as giving them an implied right to deliver subsidized water to leased tracts of any size...." *Id.* at 807-08. In support of this argument the water districts pointed to a particular provision of their contracts, which explicitly precluded delivery to land in excess of 160 acres held "in common ownership." The presence of this language, they argued, gave them an implied right to deliver water to farms of any size, as long as the farms are leased instead of owned.

The Ninth Circuit did not agree:

> As the Supreme Court has stated when reviewing a similar claim to a vested right based on an implied contractual provision, the Water Districts' claim "lies in the periphery where vested rights do not attach." *Darlington*, 358 U.S. at 90.
>
> The Supreme Court considered and rejected a similar due process claim to an implied contractual right against the government in Darlington, and its analysis controls. Darlington involved another federal subsidy, a mortgage insurance program embodied in the 1942 National Housing Act, 56 Stat. 303, 12 U.S.C. § 1743, as amended by § 10 of the Veterans' Emergency Housing Act of 1946, 60 Stat. 207, 214, and the regulations issued thereunder. Congress enacted the program with the aim of making housing more accessible to veterans and their families. A corporation, which had entered into a federal contract to obtain mortgage insurance, rented apartments to transients, a use not expressly prohibited by the contract, controlling statute, or regulations promulgated thereunder. In fact, the only relevant requirement in force at the time the mortgage insurance contract was entered into was that the property be "designed principally for residential use." 358 U.S. at 85 (quotation omitted). Five years later,

Congress enacted legislation expressly barring the rental of such housing units to transients. The corporation sued, asserting that the amendment amounted to an unconstitutional infringement of its contractual rights.

To determine whether a right to rent to transients could fairly be implied in the contracts, the Court turned to the legislation that had authorized the contracts. Review of the controlling statute, the National Housing Act, convinced the Court that the "legislation [was] passed to aid veterans and their families, not...to promote the hotel or motel business." *Id.* at 87 (footnote omitted). Congress's intention that the mortgaged properties be rented only as permanent dwellings pervaded the Committee reports and other legislative history, although the requirement was never made expressly. Because the legislative purpose of the Act was to provide permanent homes for families, and in particular, for veterans and their families, the Court declined to hold that the plaintiff had an implicit right to engage in conduct that did not serve that purpose. The Court rejected the argument advanced by the dissent that Darlington's contract gave it a vested right to make rentals to any persons and in any manner that was not expressly prohibited by the statute or contract. *Id.* at 95 (Harlan, J., dissenting). Instead, the Court concluded that "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Id.* at 91, . By passing legislation barring rentals to transients, Congress was simply making explicit the policy underlying the legislation, thus "doing no more than protecting the regulatory system which it had designed." *Id.*

The similarities between the Water Districts' claim in this case and the claim rejected in Darlington are striking. The Water Districts contend that because they were not expressly prohibited by the Department in their contracts from providing water to leased land, they have a contractual right to do so which must be considered "vested" or immune from later regulations or statutory amendments. This argument was squarely rejected in Darlington as insufficient ground on which to base a claim to a vested right.

As in *Darlington*, the implied right asserted here clearly violates the spirit, if not the letter, of the reclamation laws which authorized such contracts. The reclamation projects were funded by the federal government with the express intent that the subsidized water be used to promote the development of family-owned farms. See discussion, supra, at pp.

> 802-803. Prior to the RRA, Congress had always required that land receiving reclamation water be owned in no larger than 160-acre parcels and that the owners of the land occupy it or reside in the neighborhood. The fact that the Department of the Interior ignored the residency requirement and turned a blind eye to the practice of large-scale leasing does not lessen the importance of these restrictions in the congressional scheme. Nor did the Department's lax enforcement policy over the years remove the ever-present possibility that Congress would buttress the reclamation laws "by subsequent amendments to achieve [its original] legislative end." *Darlington*, 358 U.S. at 91.
>
> In sum, the fact that the reclamation laws had as their end the dismantling of large landholdings in the West and the redistribution of that land to families, effectively undercuts the Water Districts' argument that they were given an implied right to deliver the water to farms regardless of size, as long as the land was not actually owned by the operator of the farm. To find a vested contract right with these facts, we believe, would seriously impair Congress's sovereign power to pass laws for the public welfare. Were we to accept the Water Districts' argument, parties that enter into contracts with the government pursuant to such legislation could claim vested rights to engage in all conduct not expressly forbidden in the contracts. We do not believe that Congress must exhaustively proscribe conduct in a regulated field to prevent parties from claiming an "implied vested right" to engage in conduct found by later Congresses to be harmful to the public welfare.

Peterson, 899 F.2d at 809-11 (parallel citations omitted).

Plaintiffs latch onto this reasoning, arguing that unlike in *Peterson* where the legislative interest in the "promot[ion] of family farming by providing water subsidies to family farms" was in conflict with the asserted implied contractual right, here the legislative interest in the equitable distribution of water is not in conflict with the implied right asserted by Plaintiffs here – the right to not be unreasonably refused permission to transfer water. (*See* Doc. 85 at 15.) But, Plaintiffs ignore a fundamental distinction between *Peterson* and this case, the key language in the *Peterson* contracts which precluded delivery of

water to particular sized farms held "in common ownership." That language at least arguably implies that delivery to leased farms above the size limit would be permissible. The Ninth Circuit found this alleged implied right to be incompatible with the statutory scheme and its legislative purposes. Here, there is no language in the Landowner contracts that can fairly be read as impliedly creating a right to be permitted to transfer water to the SA. Article 20 expressly prohibits such transfers without the written permission of the Board.

Finally, Plaintiffs point to parol evidence in an attempt to establish that existence of a vested right. For example, Plaintiffs refer to Belridge's transfer policy, in operation prior to the February 16, 2005 vote, specifying a procedure for effecting transfers. Plaintiffs insist that "there must be a right or there would be no need for a transfer policy." Plaintiffs describe a series of additional factors that they believe are "evidence" of a vested right, including: (1) that NSA landowners have transferred water from the NSA to the SA in prior years; (2) NSA landowners have sold water entitlements; (3) language in the Top Contract defines NSA entitlement as "that portion of the District Contract Entitlement appurtenant to lands in the non-service area on January 1, 1999, less the amount of such portion, if any, that is transferred outside of the Non-Service Area after January 1, 1999;" (4) the April 3, 1967 amendment to the Landowner Contract increased that amount of annual entitlement of Occidental Land and Development Company, Ltd., a predecessor-in-interest to Plaintiffs, for an uncontracted portion of Belridge's maximum contract entitlement;

(5) Belridge asked NSA Landowners to choose between keeping, terminating or transferring water entitlement in 1994; and (6) Plaintiffs' property is subject to foreclosure for non-payment of assessments that Plaintiffs have paid in the past. (*See* Doc. 85 at 6.)

But, all of this "evidence" boils down to an expectation on the part of NSA landowners that they would be permitted to transfer their water rights. No constitutionally protected right can be "spun out of the yarn of investment backed expectations." *Peterson*, 899 F.2d 813. Peterson expressly rejected similar arguments:

> The Water Districts urge yet another line of reasoning in their effort to establish a vested property right in the contracts. They argue that they have a "reasonable investment-backed expectation" to receive water at subsidized rates and that this expectation amounts to a property interest that is protected by the fifth amendment. They claim that their expectation of subsidized water was reasonable based upon the statutes then in effect and upon the representations "made by the United States during the negotiation, drafting, and execution of the water service contracts." *813 Appellants' Opening Brief at 36. They also point to the investments that the Water Districts and property owners made, in reliance upon these representations, statutes, and contracts, and claim that section 203(b) destroys their reasonable expectation that they would continue to receive subsidized water for lands leased in excess of 160 acres.
>
> The Water Districts offer no authority for the proposition that a constitutionally protected property interest can be spun out of the yarn of investment-backed expectations. Their reliance upon Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) for this argument is misplaced. Ruckelshaus is authority for the proposition that once a constitutionally protected property interest is established, then a reasonable investment-backed expectation is one of several factors to be taken into account "when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.' " 467 U.S. at 1005 Whether a "taking" has occurred is the second step of the inquiry. Here, we do not reach that step

> because the Water Districts have failed to survive the first step, which is establishing that a property right exists. Thus, the Water Districts' reliance on Ruckelshaus is misplaced, leaving them with no support for the curious proposition that investment-backed expectations can give rise to a constitutionally protected property interest.

Peterson, 899 F.2d 812-13 (parallel citations omitted).

Plaintiffs also refer to a line of authority that stands generally for the proposition that water rights are a form of real property. Specifically, Plaintiffs argue:

> The right to receive water is a form of real property.
>
> > The right in water which has been diverted into ditches or other artificial conduits, for the purpose of conducting it to land for irrigation, has been uniformly classed as real property in this state. *Stanislaus Water Company v. Bachman* 152 Cal. 716, 726-727 (1908) (citations omitted).
>
> The principles stated in Stanislaus have not changed. The right to use water for irrigation is not personal property but is real property. *Fawkes v. Reynolds* 190 Cal. 204, 211 (1922); *Schimmel v. Martin* 190 Cal. 429, 432 (1923). "Water rights are a species of real property capable of acquisition by adverse user." Locke v. Yorba Irrigation Company 35 Cal.2d 205, 211 (1950). The right to the use of water is classified as real property and "The concept of an appropriative water right is a real property interest incidental and appurtenant to land." *Fullerton v. State Water Resources Control Board* 90 Cal.App.3d 590, 598 (1979).
>
> The SWP water rights are post-1914 appropriative water rights held by the State. The State contracts with the Kern County Water Agency (KCWA) who in turn then contracts with its members Landowner Contract defines the term in Article 1(b) as:
>
> > the total amount of water to be made available by District to Buyer during the particular year under the terms of the Landowner Contract. Said amount is the product, expressed in acre feet,of Buyer's total acre foot per acre entitlement for such year as set forth in Exhibit "C" hereto attached and multiplied by the number of "owner acres" included within the land described in Exhibit "E" hereto attached for which water is available hereunder for such year.

> The term acre foot per acre "entitlement" seems to define the annual entitlement for each acre of land owned by Plaintiffs.
>
> Section 11.00 of the Top Contract defines the "annual entitlement" as each Buyer's portion of the NSA entitlement, expressed as a percentage of the NSA entitlement.
>
> Entitlement is used in at least two senses: (i) as a share of the water supply available in a given year; or (ii) a share of the overall maximum water supply available to the District. When the District sent Plaintiffs $500,001 in checks the District stated that Plaintiffs sold "annual entitlement" and received compensation therefor. See Exs. 14, 15. Therefore the term "annual entitlement" has to be susceptible of a meaning that includes giving a vested right to the entitlement to the land owner.

(Doc. 85 at 4-5(emphasis added).) In so arguing, Plaintiffs suggest that their water entitlement is a "real property right," deriving its character from the "SWP water rights [that] are post-1914 appropriative water rights held by the State." But, to the contrary, Plaintiffs hold a contract right to water entitlement. True, the entitlement runs with any transfer of their land and is measured by the acreage of their landholdings, however this does not transform their contract water right into an appropriative right classed as real property in California under. *Stanislaus*, 152 Cal. 716.

Finally, Plaintiffs appear to confuse their inverse condemnation claim with one based on contract, arguing that the term "annual entitlement" in the landowner contract is "reasonably susceptible of a meaning that includes giving a vested right to the entitlement to the land owner." (Doc. 85 at 4.) Plaintiffs offer absolutely no legal authority to support the proposition that a vested property right worthy of protection under the Fifth Amendment can arise simply by virtue of ambiguous

contractual language.

Defendants' motion to dismiss the Inverse Condemnation claim is **GRANTED WITH PREJUDICE.** Plaintiffs were previously given leave to amend on the condition that they re-allege their inverse condemnation claim in good faith.

Plaintiffs also discuss in great detail the other elements of an inverse condemnation claim, including a detailed analysis of the *Lucas and Penn Central* tests. Plaintiffs' discussion of these authorities adds nothing to the threshold inquiry – whether they possess a vested property right.

4. Contract-Based Claims (Sixth, Seventh & Eighth Claims).

Plaintiffs' sixth, seventh, and eighth claims are for "Breach of Written Contract," "Breach of Implied in Fact Contract," and "Breach of the Implied Covenant of Good Faith and Fair Dealing," respectively. (SAC at ¶¶ 39-42.) Defendants move to dismiss all three of these claims.

a. Breach of Express Contract (Sixth Claim).

Plaintiffs allege that Defendants breached the terms of the Plaintiffs' Landowner Contract by "refusing to allow Plaintiffs to amend their Land Owner Contract[s] to allow transfer of entitlement and water from Plaintiffs' NSA lands to SA lands, in common with prior practice in administering other landowner contracts." (SAC at ¶222.) Plaintiffs contend that this "failure and refusal to perform" directly damaged Plaintiffs through the loss of 2,726.64 acre feet of annual water entitlement valued at least at $3000.00/AF, are $8,179,920, if

Plaintiffs are permanently deprived of such entitlement...." (*Id.* at ¶223.)

Article 5(b) of the LC sets forth the method for calculating the volume of a Buyer's entitlement to water under the contract:

> Commencing with the year of initial delivery, [Belridge], each year, shall make available for delivery to Buyer in each Zone of Benefit, as such zones are shown on the plan attached hereto as Exhibit "A", the amount of Project Water expressed in acre feet which is the product of Buyer's acre foot per acre entitlement in such Zone of Benefit for such year as set forth in Exhibit "C" hereto attached multiplied by the number of "owner acres" included within the portion of Said Land in said Zone of benefit. The total of all such amounts, for any year is referred to in this Contract as Buyer's annual entitlement for such year.

Article 6 of the Landowner Contract explains that Belridge's delivery obligation is limited to the delivery of Project Water to specified locations (set forth in Exhibit D to the LC):

> Project Water made available to Buyer pursuant to this Contract shall be delivered to and accepted by Buyer **only at the locations specified on Exhibit "D"** hereto attached at which District has installed delivery structures in accordance with Article 7 hereof

(LC Art. 6 (emphasis added).) Article 7 sets forth additional rights and obligations regarding the delivery of water to the locations specified in Exhibit D:

> District shall, on six (6) months written request from Buyer and upon payment by Buyer to District of the connection service charge of District then in effect, install and thereafter maintain during the term of this Contract delivery structures **at such of the locations designated on Exhibit "D"**, as Buyer shall direct. Said delivery structures shall be and remain the property of District. The cost of repairing any such structure damages by cause other than normal wear or negligence of District shall be paid by Buyer to District promptly upon written demand.

(LC Art. 7 (emphasis added).) Plaintiffs do not allege that their NSA lands are currently serviceable by delivery structures

at any of the locations designated in Exhibit D as points of delivery.

The right to receive water under the LC is "appurtenant to [the] land," (LC Art. 21), but a Buyer's ability to transfer the appurtenant water entitlement to other lands is limited:

> Project water delivered to Buyer pursuant to this Contract shall not be sold or otherwise disposed of by Buyer for use other than on Said Land without the prior written consent of District.

(LC Art. 20)(emphasis added).

Plaintiffs maintain that this language obligates Plaintiffs to allow transfers from NSA to SA lands in accordance with the prior practice of the district. Defendants respond that Plaintiffs fundamentally misunderstand the Landowner Contract:

> Article 5(b) of the Landowner Contract provides that the District shall make water available to Plaintiffs beginning with the year of initial delivery. Accordingly, Plaintiffs have no obligation under the Landowners Contract, including the obligation to pay for water, until there are facilities to begin delivery of water to Plaintiffs. Landowner Contract, p. 27. Thus, the District has no present obligation to make water available and deliver water to Plaintiffs. Article 20 is not pertinent to that issue.

(Doc. 86, Deft's Reply, at 6.)

To be liable for breach of a written contract, Defendants must have unjustifiably failed to perform a promise contained within that contract. *See* 1 Witkin, Summary of California Law (10th ed. 2005), Contracts § 847.

Nothing in the contract obligates the District to approve the transfer requested by Plaintiffs, nor does anything in the contract preclude the district from "unreasonably withhold[ing] such approval" or denying such approval "in an arbitrary and capricious manner." (Doc. 18.) Such obligations may derive from

other bodies of law, but not from the four corners of the Landowner Contract itself unless Plaintiffs can allege they have satisfied conditions precedent set forth in the contract. Plaintiffs have not alleged such compliance nor pointed to any term in the Landowner Contract that is reasonably susceptible to the reading they suggest.

b. Breach of Implied Contract (Seventh Claim).

Plaintiffs next claim is that Defendants breached an implied agreement to approve the transfer request:

> [T]he District had an established practice allowing the transfer of NSA entitlement and amendment of NSA Land Owner Contracts to conform to such transfers....[I]n addition[,] the District's policy since May 1999 was to allow transfer of entitlement from the NSA into the SA portion of the District, and the Top Contract which was made effective January 1, 1999 acknowledged that the amount of NSA entitlement appurtenant to NSA lands was subject to diminishment as NSA entitlement was transferred outside the NSA after January 1, 1999.
>
> Based on the foregoing, Plaintiffs had an implied in fact agreement and/or an agreement implied by conduct that Plaintiffs would be allowed to transfer the entitlement appurtenant to their NSA land to the land in the SA portion of the District and to that end made request therefor by letter dated January 10, 2005.

(SAC at ¶225.)

Defendants rejoin by citing, *Lance Camper Manufacturing Corp. v. Republic Indemnity Co.*, 44 Cal. App. 4th 194, 203 (1996), which discusses the "well settled" principle "that an action based on an implied-in-fact or quasi-contract cannot lie where there exists between the parties a valid express contract covering the same subject matter." Defendants argue that the implied promise suggested by Plaintiffs conflicts with the express terms of the Landowner Contract, so they cannot be read into the contract:

> The express terms of the Landowners Contract provide, however, that (1) the Landowners Contract and Plaintiffs' right to receive water thereunder are appurtenant to their Non-Service Area land (Landowners Contract, p.24), (2) the District shall make water available to Plaintiffs' when water service to their Non-Service Area lands begins (Landowners Contract, p. 5), and (3) water delivered pursuant to the Landowners Contract shall not be sold or otherwise disposed of for use other than on Plaintiffs' land without the prior written consent of the District (Landowners Contract, p. 24). Thus, the Landowners Contract precludes the very transfer of entitlement and water to which Plaintiffs' claim that Defendants have impliedly agreed.

(Doc. 65 at 16.)

Plaintiffs respond by arguing that it is "unreasonable for the District not to approve an NSA landowner's request to transfer NSA entitlement to the SA, while simultaneous[ly] allowing a party with inferior rights (Top Contract parties) the right to use that same water in the SA." (Doc. 85 at 18.) Although this may be hypothetically unfair, the contract has not been previously modified as to Plaintiffs. Whether the Board's (or the District's) conduct in the past violated the contract or was ultra vires, is addressed under other legal remedies.

c. Breach of the Implied Covenant of Good Faith and Fair Dealing (Eighth Claim).

Finally, Plaintiffs' eighth claim alleges that Defendants breached the covenant of good faith and fair dealing by refusing to amend their Landowner Contract:

> 231. Implied in each [contract], including the Landowner Contract, is an implied covenant of good faith and fair dealing which imposes on each party to the contract the duty to refrain from doing any act which would deny to the other party the benefits of the contract or which would make performance of the contract impossible, and to do every act each party is bound to do to accomplish the purpose of the contract, including the Land Owner Contract between Plaintiffs

> and the District.
>
> 232. As a consequence of the act of Defendants on February 16, 2005, and acts thereafter....Plaintiffs have been denied all benefits under the Land Owner Contract appurtenant to their lands at the same time that the Land Owner Contract remains a lien on Plaintiffs' land and Plaintiffs' lands remain subject to assessments and liens imposed by the District under the Land Owner Contracts.

(SAC at ¶42.)

Defendants respond that the covenant of good faith and fair dealing is limited to assuring compliance with the express terms of a contract, and cannot be used to create obligations not contemplated in the contract. This rule was summarized in *Racine & Laramie, Ltd. v. Department of Parks & Recreation*, 11 Cal. App. 4th 1026, 1031-32 (1992):

> The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683-684, 689-690.) "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." (*Id.* at p. 690.) As we stated in *Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136 at page 1153: "In essence, the covenant is implied as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party's rights to the benefits of the contract."
>
> ***
>
> If there exists a contractual relationship between the parties, as was the case here, the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract. (*Gibson v. Government Employees Ins. Co.* (1984) 162 Cal.App.3d 441, 448 [208 Cal.Rptr. 511].)

The plaintiff in *Racine* argued that the implied covenant of good faith and fair dealing required the defendant to negotiate a

modification of plaintiff's concession contract. The *Racine* court reasoned that the "provision closest to a possible obligation is that contained in paragraph 25 of the contract," which provided:

> Notwithstanding any of the provisions of this contract, the parties may hereafter, by mutual consent, agree to modifications thereof or additions thereto in writing which are not forbidden by law. The State shall have the right to grant reasonable extensions of time to Concessionaire for any purpose or for the performance of any obligation of Concessionaire hereunder.

Id. at 1030-31. This language was found to "fall[] far short of the imposition of any [enforceable] obligation on either party to even participate in activity leading to a modification of the concession." *Id.* at 1032. Absent a contractual agreement to negotiate, the *Racine* court found there was no obligation to negotiate in good faith. *Id.*

Here, the language in the Landowner Contract that comes closest to imposing a duty to consider Plaintiffs' transfer request in good faith is contained within Article 20, which provides:

> Project water delivered to Buyer pursuant to this Contract shall not be sold or otherwise disposed of by Buyer for use other than on Said Land without the prior written consent of District.

This language is non horatory and is even less favorable to Plaintiffs than was the *Racine* contract language. Article 20 affirmatively forbids transfers without the express written consent of the District and contains no language obligating the district to negotiate NSA water transfers in good faith.

Defendants insist that the Landowner Contract does establish a right to water delivery, arguing

> The water is delivered to the land each year after the initial delivery. The initial delivery takes place after the District builds out the transportation facilities. This effects the right to delivery, not the right to the water or the entitlement. The contract gives the right to deliver the water to other locations provided that the District agrees. The District may not unreasonably withhold approval or not allow the request for an arbitrary or capricious reason. The implied covenant of good faith and fair dealing is supported by this term and acts to prevent the District from continuing to sell water to Top Contract buyers that provide financial benefits to individual Board members when there is a request by the entitlement holder to make the same use of that entitlement and water.

(Doc. 85 at 18 (emphasis added).) But, the Landowner Contract only establishes the right to delivery of water to the NSA lands if and when delivery structures are constructed to reach those lands. The contract specifically prohibits the transfer of water entitlement from one place or another without prior permission of the District. Whether the District approves of such a transfer is a matter of policy and politics, not a matter of contractual obligation, express or implied.

Moreover, no tortious breach of contract for violation of the implied covenant of good faith and fair dealing can be advanced in this case, because such a claim is only recognized in special relationship (insurance contract) and employment contract (public policy) cases. *See e.g., Bionghi v. Metropolitan Water Dist. of So. California*, 70 Cal. App. 4th 1358, 1370 (1999) ("[T]ort recovery for breach of the covenant is available only in limited circumstances, generally involving a special relationship between the contracting parties, such as the relationship between an insured and its insurer.").

Defendants' motion to dismiss the eighth claim (implied

covenant of good faith and fair dealing) is **GRANTED without leave to amend.**

5. Tort-Based Claims (Fifth, Ninth & Tenth Claims).

Plaintiffs also set forth three tort claims: Conversion (Fifth Claim); Intentional Interference with Prospective Economic Advantage (Ninth Claim); and Negligent Interference with Prospective Economic Advantage (Tenth Claim). Defendants attack these claims on numerous grounds, arguing that all three claims are barred because (1) public entities and directors may not be sued in tort for their discretionary actions; and (2) Defendants failed to comply with the California Tort Claims Act. In the alternative, Defendants argue that all three allegations should be dismissed for failure to state a claim.

a. Discretionary Act Immunity.

California Government Code section 820.2 provides that public officials are immune from tort liability for discretionary acts:

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Section 815.2(b) provides similar immunity for public entities:

> Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

A California Supreme Court case, *Caldwell v. Montoya*, 10 Cal.4th 972 (1995), provides additional guidance:

> [A] "workable definition" of immune discretionary acts draws the line between "planning" and "operational"

> functions of government. Immunity is reserved for those basic policy decisions which have been expressly committed to coordinate branches of government, and as to which judicial interference would thus be "unseemly." Such areas of quasi-legislative policy-making are sufficiently sensitive" to call for judicial abstention from interference that "might even in the first instance affect the coordinate body's decision-making process."
>
> On the other hand...there is no basis for immunizing lower-level, or "ministerial," decisions that merely implement a basic policy already formulated. Moreover...immunity applies only to deliberate and considered policy decisions, in which a conscious balancing of risks and advantages took place. The fact that an employee normally engages in discretionary activity is irrelevant if, in a given case, the employee did not render a considered decision.
>
> Recognizing that "it is not a tort for government to govern" our subsequent cases have carefully preserved the distinction between policy and operational judgments. Thus, we have rejected claims of immunity for a bus driver's decision not to intervene in one passenger's violent assault against another, a college district's failure to warn of known crime dangers in a student parking lot, a county clerk's libelous statements during a newspaper interview about official matters, university therapists' failure to warn a patient's homicide victim of the patient's prior threats to kill her, and a police officer's negligent conduct of a traffic investigation once undertaken.
>
> On the other hand, we have concluded that the discretionary act statute does immunize officials and agencies against claims that they unreasonably delayed regulations under which a murdered security guard might have qualified himself to carry a defensive firearm, or negligently released a violent juvenile offender into his mother's custody.

Id. at 981-82 (internal citations and quotations omitted) (emphasis added).

Both parties also cite to the discussion of these principles contained in *Sumner Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 722 (E.D. Cal. 1993). In determining whether the discretionary duty exception applied, *Sumner Peck* inquired

whether the defendant officials "render[ed] a considered decision." *Id.* at 723. In *Sumner Peck*, the plaintiffs' allegations focused on two events:

> 1) The water district's decision to enter into the April 3, 1985 Agreement, which resulted in the closure of the San Luis Drain and blockage of the collector system while delivery of irrigation water was continued; and 2) The water district's decision to fund projects which failed to provide drainage but instead promoted the increased delivery of irrigation water.

These alleged acts were found to "fall squarely within the immunity provided under section 820.2, as interpreted by California courts." *Id.*

> Westlands is vested by state law with the authority to enter agreements and make funding decisions. *See, e.g.*, Cal. Water Code § 35851 (authorizing the district to enter into contracts with the United States, "as the Board deems proper, advisable or in the interests of the district"); §§ 36455, 36455.2 (authorizing the district "in the discretion of the board of directors" to acquire and construct various works, and provide funding by levying assessments and issuing bonds). The alleged decisions made by the Board, the district's legislative body, were purely discretionary. The Board's determination that it was better to agree to block existing drainage facilities than to risk losing both drainage and irrigation water delivery service in a legal battle with the State and the federal government was a "basic policy decision" which it was authorized to make. The decision to fund one project instead of another is similarly a purely legislative concern. Section 820.2 makes these policy decisions unreviewable by the judicial branch. Allegations that these decisions were unwise, or even an abuse of the Board's discretion, do not diminish Westlands' entitlement to discretionary act immunity.

Id.

The plaintiffs in *Sumner Peck* cited *Sandrini Brothers, Inc. v. Voss*, 7 Cal. App. 4th 1398, a case in which the Director of California's Department of Food and Agriculture was not immune under § 820.2 for damages suffered by a property owner resulting

from a wrongful seizure of crops. The Director in *Sandrini* acted pursuant to a state statute which provided that he may order contaminated crops seized. The *Sandrini* court held that "[a] broad policy or planning decision is not involved" in the Director's choice as how to handle the crops. *Id.* at 1408. *Sumner Peck* distinguished Sandrini, reasoning:

> Whether to seize the crops or choose an alternate course of action was merely a ministerial decision. *Id.* Here, the difficult and well-debated decisions to settle ongoing litigation by choosing to block drainage in exchange for continued water delivery and to fund delivery programs while allegedly abandoning the drainage program implicate broad policy choices rather than merely ministerial functions.

Id. at 724. In so holding, the *Sumner Peck* court examined the minutes of the Westlands' Board meetings against the standard for the application of discretionary act immunity: "[T]o be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place." *Id.* at 724 (citing *Johnson v. California*, 69 Cal. 2d 782, 795 (1968)). *Sumner Peck* held that the minutes satisfied this standard. For example, the minutes indicated that the Westlands' Board "was aware prior to the April 3, 1985 Agreement that its access to irrigation water was threatened;" it was "apprised of the risks and advantages involved in its later decision to plug the drainage collector system;" and "funding decisions were discussed by the Board." *Id.* at 725-26.

Here, Defendants argue that the February 16, 2005 decision was not a considered decision:

> Defendants merely rationalized post hoc that the Board determined that the District's long-term economic health would benefit by not permitting permanent transfers of entitlement (even though the Top Contract

> does just that). According to Sumner Peck the Board should have stated the factors that were balanced to reach the conclusion that it was, and is, in the District's best interest to deny permanent transfers fo entitlement to NSA land owners. In *Sumner Peck* the board made a "basic policy decision" that it was better to agree to block existing drainage facilities than to risk losing both drainage and irrigation water delivery service. In the case at bench, the Board clearly made a decision without weighing the benefits against the district's perceived risks, all of which they have utterly failed to disclose or consider.

(Doc. 85 at 19.)

Defendants assert that the decision was a considered one, pointing to the minutes of the February 16, 2005 Board meeting (Doc. 68, Hughes Decl. Ex. C), the minutes from a previous Board meeting on January 11, 2006 (*id.* at Ex. K), an ad hoc committee report regarding the establishment of a charge to permanently transfer NSA entitlement to SA lands (Carlson Decl., Doc. 57, at Ex. 30), along with landowner responses to that ad hoc committee report (*Id.*). (All of these documents are judicially noticeable public records.)

A close examination of these documents reveals that the board closely considered the question of whether to impose a transfer charge on the permanent transfer of NSA entitlement to SA lands. This is the subject of the ad hoc committee report, and the subject of some discussion at the January 11, 2005 and February 16, 2006 Board meetings. What is not so clear from the current record is the extent to which the Board considered the actual decision made – to permanently ban permanent transfers. The idea was suggested by one of the comment letters received by the Board in response to the circulation of the ad hoc committee report. That letter, from Starrh & Starrh Cotton Growers to Mr

Hammet, General Manager of the District, appended to the ad hoc committee report states:

> We received your memo dated September 9, 2004 requesting comments on the proposed transfer policy of entitlement from the NSA.
>
> It is my understanding that the [NSA] contracts are appertainent [sic] to the land, that is, the [NSA] landowners have the right to activate their contracts and use water on the land specified in the contract, but they have no right to permanently transfer the entitlement anywhere else.
>
> Recently we have seen increased requests to transfer entitlement from the [NSA] area into the [SA]. There seems to be an equity issue that should be addressed and has to do more with continued use of water use than monetary compensation.
>
> Historically, the [NSA] area entitlement was a burden to the district that often resulted in increased expense to landowners in the [SA]. With the implementation of the top contracts, the [NSA] landowners have been spared the expense of holding the water while maintaining their contract rights. Some of these landowners [who are parties to the top contracts] have planted permanent crops in order to help cover the expense of the water. Now that the entitlement costs have been carried for several years and the agricultural economy has improved, some of the [NSA] landowners are asking the Board to add value to their contractual rights by allowing the entitlement to be transferred. There seems to [be] a question as to whether the Board should permit any activity beyond that specified in the contract if there are adverse impacts on other landowners in the District.
>
> The entitlement to the NSA only gains value through the Board's action to permit that entitlement to be moved. There is no right to move the entitlement. If [] there is no right to move entitlement, I would question why the Board would implement a policy that benefits some landowners while making other landowners worse off. It seems especially ironic that the landowners who are being hurt are the same ones who have supported and preserved the NSA entitlement in the first place.
>
> ***

(Doc. 57, Carlson Decl., Ex. 30)

The Minutes of the February 16, 2005 Board Meeting (*see*

Hughes Decl., Ex. C) reveal considerable discussion of whether the "imposition of a fee as a condition to the amendment of a contract to allow the permanent transfer of Annual Entitlement creates a disqualifying conflict of interest for any Director." (*Id.* at C-4.) The meeting then turned to the topic of "the Board's policy regarding permanent transfers of Annual entitlement from the Non-Service Area to the Service Area." (*Id.*)

> The President began by noting his recollection that when the permanent transfers of Annual Entitlement outside of the District were approved some years ago the Board's position was that there would be no further permanent transfers of Annual Entitlement outside of the District. The Directors concurred with the President's recollection. The President then asked those in attendance for their comments. Larry Ritchie, Larry Johns, Fred Starrh, Scott Hamilton, Raymond L Carlson and Leon Etwell provided their comments regarding the permanent transfer of Annual Entitlement from the [NSA] to the [SA].
>
> The President acknowledged that transfers of Annual Entitlement between Zones of Benefit and from the [NSA] to the [SA] have historically been made. The General Manager then presented a spreadsheet explaining the reduction in [NSA] Annual Entitlement over the years and identifying permanent transfers from the [NSA] both outside of the District and to the [SA].
>
> Larry Starrh asked Legal Counsel to further explain how amendment of Landowner Contracts relates to the permanent transfer of Annual Entitlement from the [NSA] to the [SA]. Legal Counsel advised that a permanent transfer of Annual Entitlement requires amendment to a Landowners Contract or Water Supply Contract, as the case may be. Each Landowners Contract and Water Supply Contract is appurtenant to a particular parcel of land. The parcel of land described in the contract would need to be amended to a parcel within the Service Area thereby allowing the delivery of water to begin with respect to that Annual Entitlement under the contract.
>
> David L. Barger then questioned whether Annual Entitlement under a Landowners Contract or Water Supply Contract could be transferred on a year-to-year basis. Legal Counsel responded that a permanent transfer of Annual Entitlement requires an amendment to the

> underlying contract, which the District would not wish to perform on a year-to-year basis. Following further discussion, Robert E. Baker moved to adopt a policy whereby Landowner Contracts and Water Supply Contracts shall not be amended for the purpose of permanently transferring Annual Entitlement from the [NSA] to the [SA] Larry Starrh seconded the motion. The President asked the Directors for any additional discussion. David K. Banker questioned whether implementation of the proposed policy could take effect after the current requests for permanent transfers are approved. The President noted that the implication of Director Baker's motion was that the policy would take effect immediately and apply to all pending requests. Director Baker advised that he did not wish to amend his motion to delay implementation of the proposed policy. The motion then carried on the following vote.
>
> AYES: Robert E. Baker
> Larry Starrh
> William D. Phillimore.

(*Id.* at C-4 - C-5.) The extent to which the Board "considered" Director Baker's motion is not sufficiently clear from the current record to apply discretionary immunity as a matter of law. Further discovery might reveal that a truly considered decision was made. For the purposes of the pending motion, however, the tort claims cannot be eliminated on this ground at this time. **Nevertheless, all of the tort claims fail on other grounds, as discussed below.**

b. California Tort Claims Act.

Even if the acts challenged by Plaintiffs' tort claims were not discretionary, they are barred because Plaintiffs failed to comply with the exhaustion requirements set forth in the California's Tort Claims Act, Cal. Gov. Code 911.2(a). A plaintiff seeking to bring tort claims against a government entity to presented those claims to the government entity within a limitations period, either six months or one year, depending on

the nature of the tort alleged:

> A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) not later than six months after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) not later than one year after the accrual of the cause of action.

Cal. Gov. Code § 911.2(a). Here, Plaintiffs' tort claims arise out of the vote taken by the Belridge board on February 16, 2005. Plaintiffs did not present their claim to Belridge until February 15, 2006. Defendants assert that all of the tort claims are barred because the six month limitations period, applicable to claims concerning personal property, controls here. Plaintiffs, however, maintain that the one year window, applicable to "any other cause of action" applies.

It is clear from the face of the complaint that Plaintiffs' conversion claim for deprivation of water rights is a claim concerning personal property, as the very definition of the tort of conversion is the wrongful exercise of dominion over the personal property of another. *In re Pekler*, 260 F.3d 1035, 1037 (9th Cir. 2001)(applying California law). There is no question that the six month limitations period applies to this claim.

Determining what limitations period to apply to the remaining two tort claims, for intentional and negligent interference with prospective economic advantage, is not as clear. Plaintiffs assert that they actually suffered injury to their "contracts and business relationships," specifically those contract and business relationships between Sandridge and

Plaintiffs. Defendants cite *Storeck & Storeck, Inc. v. Port of Oakland*, 869 F.2d 1322, 1325 (9th Cir. 1989), for the proposition that Plaintiffs cannot escape the operation of the six month limitations period by simply labeling their claims as being "contractual" in nature. In *Storeck* the Ninth Circuit considered claims brought by real estate developers who sought to develop a portion of downtown Oakland. The Oakland authorities gave preliminary to approval to the Storecks' plans for the development, but placed a number of conditions on approval of the project. After preparing various aspects of the project over a ten month period, the Storecks were unable to satisfy all of the conditions and asked for additional time. Oakland, however, terminated the approval and began negotiations with other developers. The Storecks filed suit, alleging, among other things that Oakland City employees had conspired to interfere with the Storecks' prospective economic advantage.

The Ninth Circuit held that the conspiracy to interfere with prospective economic advantage claim was barred because plaintiff failed to comply with the then 100 day limitations period applicable to claims for "injury to personal property."[8] The Ninth Circuit reasoned:

> The Storeks presented their conspiracy claims in their third and fifth causes of action nearly one year after the court had terminated the approval in principle. The California Government Code § 911.2, governing tort claims against public entities, provides that a claim for injury to personal property shall be presented no later than the 100th day after the accrual of the cause of action. The Storeks attempt to avoid the application

[8] The statute has since been modified to replace the 100 day period with a six month deadline.

> of the tort statute of limitations by contending that their conspiracy claims are actually contract claims. They point to no law supporting the contention. They argue that the conspiracy claim "is premised on duty which does not exist but for the contractual promissory-based relationship between the Port and the Storeks." That the conspiracy claim is based on an allegation of extant contractual duty does not convert it into a contractual claim.
>
> Just as conspiracy to injure property is not an assertion of a property claim, so assertion of injury to a contract does not itself sound in contract. Doleman v. Mieji Mutual Life Insurance Co., 727 F.2d 1480 at 1482 n. 3 (9th Cir.1984); Prosser & Keaton on Torts § 129 (5th ed. 1984). These causes of action are unmistakably tort claims. See American Law Institute, Restatement (Second) of Torts, § 766B. These causes of action are barred by their 1326 untimeliness under California Government Code § 911.2.

Id. at 1325-26. Plaintiffs offer no contrary authority. Plaintiffs' claims of intentional and negligent interference with prospective advantage are undeniably tort claims and cannot be re-packaged as contract claims to escape the six month limitations period.

All of three of Plaintiffs' tort claims are barred by their failure to timely present their claims within the six month period under the California Tort Claims Act.

c. *Conversion (Fifth Claim).*

Even if the conversion claim was not barred by the California Tort claims act, it must be dismissed for failure to state a claim. As discussed, conversion is the wrongful exercise of dominion over personal property of another. *In re Pecklar*, 260 F.3d at 1037. Plaintiffs attempt to rely again on their assertion that the landowner contract bestows upon them a vested property right. First, as discussed, Plaintiffs have not pled possession of a vested property right. More importantly, only

"specific," "identifiable" personal property may be the subject of a conversion action." *Olschewski v. Hudson*, 87 Cal. App. 282, (1927) (Conversion "lies only for the wrongful appropriation of goods, chattels or personal property which is specific enough to be identified, and not to such indefinite, intangible and uncertain property rights as the mere goodwill of a business, or trade secrets, or a newspaper route, or a licensed market stall for transacting trade."). Defendants correctly point out that if one possesses a property right to water, that right is usually identified as real property, not personal property. *Santa Clarita Water Co. v. Lyons*, 161 Cal. App. 3d 450, 461 (1984)("Water in its natural state is a part of the land, and therefore real property. When severed from the realty, reduced to possession and placed in containers, it becomes personal property.").

d. Intentional (or Negligent) Interference with Economic Advantage (Ninth and Tenth Claims).

The elements of an intentional (or negligent) interference with economic advantage claim are:

(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;

(2) the defendant's knowledge of the relationship;

(3) intentional or negligent acts on the part of the defendant designed to disrupt the relationship;

(4) actual disruption of the relationship; and

(5) economic harm to the plaintiff proximately caused by the acts of the defendant.

See Youst v. Longo, 43 Cal. 3d 64, 71 (1987); *Santa Clarita Water Co.*, 20 Cal. App. 4th at 1750.

The complaint arguably alleges that the intentional or negligent interference stems from two separate courses of conduct. First, Plaintiffs appear to allege that the February 15, 2005 Board vote constituted actionable interference with Plaintiffs contractual relationship with Sandridge. But, Defendants correctly point out that Plaintiff's contract with Sandridge was not signed until March 2005. Accordingly, absent an allegation that the economic relationship began earlier than March 2005 and was known to the board at the time of the February 16, 2005 vote, this conduct cannot form the basis of an intentional (or negligent) interference with economic advantage claim.

Second, Plaintiffs allege that the Board has failed to act quickly enough to address Sandridge's concerns about building out delivery structures to Plaintiffs' NSA lands. Defendant argues that there are no facts to support this allegation, but Federal Rule of Civil Procedure 8 requires only a "a short and plain statement of the claim showing that the pleader is entitled to relief." This aspect of the intentional/negligent interference claims cannot be dismissed for failure to state a claim.

Nevertheless, these claims must be dismissed on other grounds.

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6. Ralph M. Brown Act Claim (Twelfth Claim).

Plaintiffs' previous attempt to state a claim under the Ralph M. Brown Act was unsuccessful. The January 17, 2006 order dismissed the claim from the initial complaint, reasoning:

> The Brown Act is California's local government open meeting law. Belridge is a "local agency" covered by the Brown Act. Cal. Gov. Code §§ 54950.5, 54951. Among other things, the Brown Act sets forth various procedural requirements for local government meetings, including requirements for the posting of agendas prior to such meetings. For example, at least 72 hours before a "regular meeting," a local legislative body must post an agenda containing a "brief general description of each item of business to be transacted or discussed at the meeting...." § 54954.2. Other types of meetings are subject to different notice requirements. For example, "special meetings" must be "posted at least 24 hours prior to the special meeting in a location that is freely accessible to members of the public." § 54956.
>
> The parties dispute whether the February 16, 2005 meeting was an "adjourned regular meeting" or a "special meeting." Defendants contend that it was an "adjourned regular meeting," pointing to the minutes from the February 16th meeting. As such, Defendants submit the meeting was subject to the regular notification procedures under the Brown Act.
>
> Plaintiffs insist that the meeting was actually a "special meeting" pointing to passages from the appointment calendar of Belridge's manager, Greg Hammett, which indicates that a "Special Board Meeting" was held on February 16, 2005 at 1:30 pm. Plaintiffs also submit that the February 16th meeting must be considered a special meeting because Defendants altered the agenda item from that which was posted for the January 11, 2005 meeting. Plaintiffs argue that "such an impermissible change in the agenda without following the procedures for a Special Meeting appears to be a clear violation of the Brown Act...." (Doc. 25 at 14.) However, Plaintiffs cite no authority for this proposition. Nothing in the Brown Act explicitly prohibits alteration of an agenda prior to holding re-adjourned regular board meeting. What seems to be required prior to the re-adjourned regular meeting is the re-posting of some agenda that complies with the Brown Act's provisions. Here, such an agenda was posted. The agenda announced that the following topic would be considered "Policy re: Permanent Transfer of Annual Entitlement from Non-Service Area to Service

> Area." This is a "brief general description of each item of business to be transacted or discussed at the meeting...." § 54954.2. Absent any other procedural objection, Plaintiffs have failed to state a claim under the Brown Act.
>
> Defendants motion to dismiss the Brown Act Claim is **GRANTED WITH LEAVE TO AMEND.**

(Doc. 48 at 41 (emphasis added).)

Plaintiffs now assert essentially two distinct claims. First, Plaintiffs again insist that the item on the agenda for the February 16, 2005 meeting did not appropriately describe the action that was taken by the board. (SAC at ¶¶ 255-60.) Just such an assertion was previously rejected by the district court:

> The agenda announced that the following topic would be considered "Policy re: Permanent Transfer of Annual Entitlement from Non-Service Area to Service Area." This is a "brief general description of each item of business to be transacted or discussed at the meeting...." § 54954.2. Absent any other procedural objection, Plaintiffs have failed to state a claim under the Brown Act.

(Doc. 48.) Plaintiffs offer no reason to depart from this previous ruling.

Plaintiffs also now allege that the February 16, 2005 meeting was a "special meeting" of the Board, rather than an "adjourned regular meeting" as Belridge contends. The Minutes from the January 11, 2005 Board meeting do indeed indicate that the topic of charging a transfer fee for permanent transfers of entitlement from the NSA to the SA would be discussed at a "special meeting" of the Board to be held on February 16, 2005. Defendants point to some contrary evidence in judicially noticeable documents. However, for the purposes of a motion to dismiss, the facts as pled must be viewed in a light most favorable to Plaintiffs. Therefore, the court must assume that

the February 16, 2006 meeting was a "special" meeting.

However, the legal significance of this conclusion is not obvious on the face of an otherwise detailed complaint. Plaintiffs suggested at oral argument that, assuming the February 16, 2006 meeting was a "special" meeting, it was improper for the Board to discuss a topic that was not specifically indicated on the notice for the special meeting. In support of this argument, Plaintiffs cite California Government Code § 54956, which provides:

> A special meeting may be called at any time by the presiding officer of the legislative body of a local agency, or by a majority of the members of the legislative body, by delivering written notice to each member of the legislative body and to each local newspaper of general circulation and radio or television station requesting notice in writing. The notice shall be delivered personally or by any other means and shall be received at least 24 hours before the time of the meeting as specified in the notice. The call and notice shall specify the time and place of the special meeting and the business to be transacted or discussed. No other business shall be considered at these meetings by the legislative body. The written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the legislative body a written waiver of notice. The waiver may be given by telegram. The written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes.
>
> The call and notice shall be posted at least 24 hours prior to the special meeting in a location that is freely accessible to members of the public.

But, again, the posted agenda announced that the following topic would be considered "Policy re: Permanent Transfer of Annual Entitlement from Non-Service Area to Service Area." This "brief general description," § 54954.2, encompasses the topics that were actually discussed -- the proposed transfer fee, and

the proposed ban on transfers. Plaintiff has pointed to no authority that would suggest a different result.[9]

In addition, in their opposition, Plaintiffs allege for the first time that the Board failed to post the agenda for the meeting within 72 hours of the February 16, 2006 meeting, as would be required for any "special meeting." In support of this contention, Plaintiffs cite a computer-generated list of word processing files obtained from Belridge on March 17, 2006. That list indicates that the agenda was "last modified" after the expiration of the 72 hour deadline.[10]

Defendants first protest that this untimeliness allegation was not set forth in the complaint.[11] As the untimeliness allegation is not in the SAC, it cannot be considered here. Plaintiffs are, however, **granted leave to amend as to this claim, subject to Rule 11's requirement that a good faith investigation and analysis provide a basis for the untimeliness allegation.**

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[9] Notably, Plaintiffs' counsel was present at the February 16, 2006 meeting, so Plaintiffs cannot argue that they failed to attend the meeting because the agenda item was drawn too narrowly.

[10] Plaintiffs have requested that the district court take judicial notice of this document. Absent a dispute as to the authenticity and reliability of its text, the document will be considered.

[11] Defendants also protest that the allegation is simply untrue. However, there appears to be no judicially noticeable evidence to support Defendants' contention.

7. Water Code § 43003 (Thirteenth Claim).

Plaintiffs' thirteenth claim is for a "violation of water code § 43003." (SAC at ¶¶ 265-269.) Plaintiffs allege that the District is "subject to an affirmative statutory obligation at all times to establish equitable rules and regulations for the distribution and use of water within the District." Plaintiffs allege that the District has violated this obligation by creating an "inequitable system of water allocation all in violation of and in flagrant disregard of Water Code § 43003 and under which, among other things, all of the water entitlement appurtenant to the NSA land in the District, and the water attributable to such entitlement, has been converted to Top Water which is then sold to the Buyers under the Top Contract... At the same time the owners of NSA land and entitlement are prohibited from transferring entitlement and water for use on lands in the service area portion of the District." (*Id.* at ¶268.)

Water Code § 43003 states in its entirety:

> The board shall establish equitable rules and regulations for the most economical and efficient distribution and use of water within the district, and pursuant thereto may enter into long-term water service contracts with landowners in the district which contracts may, in the discretion of the board, provide, among other things, that the obligations are a lien on the land with the same force, effect, and priority as an assessment lien if such contract is recorded in the office of the county recorder in the county in which such land is situated. The rules, regulations, and contracts shall recognize and shall be subject to such priorities in the right to water between the different consumers of the water as may legally exist. Among other things the rules and regulations may establish a procedure for fixing tolls and charges authorized by Sections 43006 and 47180 and may provide equitable rules for reapportionment of assessments supplementary to the provisions of Article 8 (commencing with Section 46325) of Chapter 2 of Part 9 of this division

Defendant argues, again, that the Board cannot be liable under Water Code § 43003 for adoption of the no-transfer policy on February 16, 2005, because that vote was a discretionary act. As discussed above, *supra* Part IV.B.5.a., this cannot be determined at this stage in the litigation.

However, Plaintiffs cite no authority that Water Code § 43003 establishes a private right of action. No cases suggest that the provision can be enforced by a member of the public. The statute is not cited in any published cases. Whether a district member or the State Attorney General has standing to enforce this statutory duty is not discussed by the parties.

Defendants' motion to dismiss the claim brought under Water Code § 43003 is **GRANTED.**

8. Failure to Complete District Project in Violation of Water Code § 42200 (Fourteenth Claim).

Plaintiffs next allege that Belridge has violated Water Code § 42200, which provides:

> Upon the organization of a district, the board shall make or cause to be made all examinations, surveys, plans and specifications, and estimates of costs for the acquisition, appropriation, diversion, storage, conservation, and distribution of water, any drainage or reclamation works connected therewith, and the generation of hydroelectric energy incident thereto, and the sale and distribution thereof, as may be necessary or requisite to enable the board to ascertain and estimate the requirements and works necessary for the purpose of the district, and the probable cost and to make a report.

The same defects -- the absence of a private right of action -- that applied to the section 43003 claim are present here. Moreover, Plaintiffs concede that a project report was prepared and that construction of the facilities proceeded in stages.

(SAC at ¶¶ 273-275). The duties prescribed by § 42220 are too general to apply in this case. Section 42225 authorizes the Board to divide the construction projects into units of construction that may be taken in the order and at the time of the Board's choosing. Those decisions are made at the Board's discretion. Article 26 of the landowner contract specifically provides that the District shall not be liable to Plaintiffs for any damages in the event the District fails to complete, for any reason, any portion of the water transportation facilities necessary to deliver water to the Plaintiffs. Section 42225 implicates only discretionary functions. No private claim for damages can be maintained under its provisions.

Defendants' motion to dismiss the claim brought under Water Code § 42200 is **GRANTED.**

9. Right to Association (Fifteenth Claim).

Finally, Plaintiffs allege that the Board violated Plaintiffs' "right of association" when the Board refused to respond to Sandridge's request for assurance that it would be treated in the same manner as other parties who had earlier been permitted to build out distribution facilities to their NSA lands. Specifically, the complaint alleges that Sandridge's build out request was on the agenda for the February 7, 2006 Board meeting but that, instead of acting on the item, the Board tabled the matter, claiming that Sandridge's request raised matters related to the pending litigation. (SAC at ¶284.) Plaintiffs allege that this refusal to act further on Sandridge's request was "retaliatory" against Plaintiffs for associating with

Sandridge and for wanting to do business with Sandridge. (*Id.* at 285.)

Defendants move to dismiss on the ground that their decision to table Sandridge's request is conduct protected by the litigation privilege, Cal. Civ. Code § 47(b). The litigation privilege protects individuals from liability arising out of any communication made (a) in a judicial proceeding, (b) by a litigant, (c) to achieve the objects of the litigation, and (d) having some connection or logical relation to the action. *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990).

As a threshold matter, Plaintiffs assert broadly that the litigation privilege does not shield Defendants from liability for a claim that alleges a violation of constitutional rights. Plaintiffs note that Defendants did not cite any cases applying the litigation privilege to claims based on asserted constitutional rights. But, one such case was easily located, *Mansell v. Otto*, 108 Cal. App. 4th 265 (2003) (applying litigation privilege to claim that constitutional right to privacy was violated).

Here, assuming Plaintiffs association claim is grounded in state, rather than federal law, the conduct that allegedly violated Plaintiffs right to association is protected by the litigation privilege. California Civil Code § 47(b) provides in pertinent part.

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> A privileged publication or broadcast is one made:
>
> (a) In the proper discharge of an official duty.
>
> (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:
>
> (1) An allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action shall not be a privileged publication or broadcast as to the person making the allegation or averment within the meaning of this section unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action.
>
> ***
>
> (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This subdivision applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based upon credible evidence, made without malice, by a current or former employer of the applicant to, and upon request of, one whom the employer reasonably believes is a prospective employer of the applicant. This subdivision authorizes a current or former employer, or the employer's agent, to answer whether or not the employer would rehire a current or former employee. This subdivision shall not apply to a communication concerning the speech or activities of an applicant for employment if the speech or activities are constitutionally protected, or otherwise protected by Section 527.3 of the Code of Civil Procedure or any other provision of law.

The most relevant portion of section 47 is subsection b, which

provides absolute privilege for any "publication or broadcast" made in any judicial proceeding. California courts have given this privilege an "expansive reach." *Rubin v. Green*, 4 Cal. 4th 1187, 1193-94 (1993). It extends to any communication that bears "some relation to any ongoing or anticipated lawsuit." *Id.* at 1194. The privilege also applies to a wide range of causes of action. The California Supreme Court noted "the only exception to [the application of [section 47(b) to tort suits has been for malicious prosecution." *Id.* The California courts have applied the privilege to claims of abuse of process, *Pollock v. Univ. of So. Cal.*, 112 Cal. App. 4th 1416 (2003), fraud, *Carden v. Getzoff*, 190 Cal App. 3d 907 (1987), invasion of privacy, *Ribas v. Clark*, 38 Cal. 3d 355, 364 (1985), *and interference with contract*, *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118 (1990).

Critically, the privilege only applies to communicative acts, not noncommunicative conduct. *Rubin v. Green*, 4 Cal. 4th 1187, 1195-96 (1993). For example, an attorney's act of counseling his or her client is covered, even if it is alleged that the attorney made misrepresentations during the course of such communications. *Id.* However, pure conduct, such as eavesdropping, is not covered. *Id.*

Here, Plaintiffs allege that the Board violated Plaintiffs' "right of association" when the Board refused to respond to Sandridge's request for assurance that it would be treated in the same manner as other parties who had earlier been permitted to build out distribution facilities to their NSA lands. The Complaint alleges that Sandridge's build out request was on the

agenda for the February 7, 2006 Board meeting but that, instead of acting on the item, the Board tabled the matter, claiming that Sandridge's request raised matters related to the pending litigation. (SAC at ¶284.) An examination of Plaintiffs First Amended Complaint (not the currently operative complaint), filed February 6, 2006, one day before the February 7, 2006 meeting, reveals that the Board was completely justified in concluding that Sandridge's build out request was related to the current litigation. The build out request is, in fact, specifically mentioned in the First Amended Complaint. (Doc. 49 at ¶¶ 73-78.)

Plaintiffs' "Right of Association" claim must be dismissed because the Board's allegedly unlawful actions in not responding based on the advice of counsel are shielded by California's litigation privilege.

Accordingly, Defendants' motion to dismiss is **GRANTED IN ITS ENTIRETY WITHOUT LEAVE TO AMEND, EXCEPT THAT LEAVE TO AMEND IS GRANTED AS TO THE BROWN ACT CLAIM.** The only claims remaining under the currently operative complaint are those that were not challenged by Defendants in this motion - the Political Reform Act Claim and the Unfair Competition claim.

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C. Request for Preliminary Injunction.

Plaintiffs' succinctly summarize their request as follows:

> Plaintiffs entered into a contract ("Contract") with Sandridge Partners ("Sandridge") for Sandridge to purchase real property from Plaintiffs ("Plaintiffs' Land") in order to make beneficial use of water rights appurtenant to such property which is located in the Non-Service Area ("NSA") portion of Belridge Water Storage District ("Belridge" or "District"). The Belridge Board retaliated against Plaintiffs by refusing to deal with Sandridge in connection with efforts to investigate building out water transportation facilities to Plaintiffs' and Sandridge's lands.
>
> After the District denied Plaintiffs' (and others') requests to transfer NSA water for use on Service Area (SA) land, Plaintiffs and Sandridge agreed to delay closing of the land sale for up to five years. As an alternate means of obtaining the water attributable to the water entitlement for Plaintiff's Land, Sandridge contacted District staff to discuss design and construction of water transportation facilities to Sandridge's and Plaintiffs' lands to make beneficial use of the water entitlement of those lands.
>
> The defendant Board members William Phillimore (Phillimore), Robert E. Baker (Baker), and Larry Starrh (Starrh) interfered with the Contract by preventing Sandridge from pursuing building out facilities to provide water delivery service to the Plaintiffs' land, causing Plaintiffs and Sandridge to delay the close of the land sale and delaying Plaintiffs' receipt of the sale proceeds.
>
> While the decisions of a public entity may deserve deference, here blatant protectionism and self-dealing by those in control of the public entity cannot be allowed. The three directors are all employed by entities that take 93.3% of the water attributable to the Plaintiffs' and other landowners' NSA land pursuant to a contract that they wrongfully entered into in light of their obvious conflicts of interest. These same directors had previously denied any change in place of use of water under Plaintiffs' and others' land owner contracts, to protect their and their employers' interest in the water off those lands, effectively amending the Top Contract by making it permanent. Now these conflicted Board members have resorted to thwarting contractual rights to continue to protect the water flow to their employers.

> The purpose of Belridge is to equitably distribute water to its members. Here, Belridge's actions are decreasing the Plaintiffs property value by over 96%. The problem would be solved by Belridge equitably distributing the water as is Belridge's public purpose. But as a landowner voting district, the biggest landowners control the District. Plaintiffs have no chance for electoral relief because the conflicted directors represent entities that own the majority of land value in the District.
>
> The activities of a water storage district like Belridge take place outside public view, without oversight by any other branch of state government. There is no oversight mechanism by which a water storage district like Belridge, or the record of its acts is made disclosable or accountable to the public, despite the fact that all water in the State of California is owned by the people of the State as a whole. California Water Code §§ 102, 1201.
>
> Plaintiffs request that the defendant Board members be enjoined from delaying the discussions regarding costing out, quoting, and possible eventual build-out of water distribution facilities between District staff and Sandridge or Plaintiffs will be irreparably harmed by being prevented from mitigating damages through the alternative of having facilities built to make water delivery to Plaintiffs' lands possible and by the commensurately longer delay in being able to close their land sale with Sandridge.

(Doc. 70 at 1-3.)

Plaintiffs' request for an injunction fails at the outset because the allegedly unlawful conduct against which Plaintiffs request an injunction is the operation of the district itself, the effect of the litigation privilege, and the highly contentious dispute over the District's operations. Therefore, Plaintiffs have not established the requisite likelihood of success on the merits of the particular claim that relates to their request for an injunction.[12]

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[12] The parties debate whether the state or federal standard for injunctive relief applies here, but, without engaging in this dispute, it is enough to note that both the

Plaintiffs' attempt to use their surviving political reform act claim to support a finding of likelihood of success, based on the conduct alleged in that claim -- that the Board's February 16, 2005 vote is void because several voting Board members operated under a conflict of interest – is only tangentially related to what is in effect a request for the court to take over management of the District.

Plaintiffs' motion for entry of a preliminary injunction is **DENIED.**

V. CONCLUSION

For the reasons set forth above:

(1) Defendants' motion to dismiss is **GRANTED IN ITS ENTIRETY, WITHOUT LEAVE TO AMEND, EXCEPT THAT LEAVE TO AMEND IS GRANTED AS TO THE BROWN ACT CLAIM.** The only claims remaining are those that were not challenged by Defendants in this motion - the Political Reform Act Claim and the Unfair Competition claim.

(2) Plaintiffs' motion for a preliminary injunction is **DENIED.**

IT IS SO ORDERED.

Dated: October 18, 2006 **/s/ Oliver W. Wanger**
b2e55c UNITED STATES DISTRICT JUDGE

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state and federal standards require a showing of likelihood of success. *See E&J Gallo Winery v. Andina Licores, S.A.*, 446 F.3d 984, 990 (9th Cir. 2006); *White v. Davis*, 30 Cal. 4th 528, 554 (2003).